Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN DAVIS, on behalf of himself and all others similarly situated,
Petitioners,
v.
STATE OF ALABAMA, PERRY O. HOOPER, SR., LARRY ROE, JAMES D. MARTIN, AND ALL ALABAMA PROBATE JUDGES, SHERIFFS, AND COUNTY CLERKS IN THEIR OFFICIAL CAPACITIES, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the *Rooker-Feldman* doctrine (forbidding lower federal courts from reviewing state court orders under the guise of deciding constitutional issues) apply only when parties to the federal and state court litigation are identical—or does it (like closely analogous *Younger* abstention doctrine, *see Hicks v. Miranda*, 422 U.S. 332, 348-49, 95 S.Ct. 2281, 2291-92 (1975)) apply as well when the parties are closely related and represented by the same counsel?

2. Do principles of our federalism permit a federal court to intervene in a state election, before state election procedures have run their course, to prohibit the counting of absentee ballots which comply with state law, while there is state court litigation addressing the same issue?

3. Can, and should, federal courts forbid the counting of a class of ballots in a state election, based on a claimed constitutional right, when no one knows whether those ballots would affect the outcome of the election?

4. Does the Due Process clause of the Fourteenth Amendment grant some voters a right to disenfranchise others whose ballots are due to be counted in a state election under state law as construed by the state's highest court?

5. Does the Due Process clause of the Fourteenth Amendment forbid application of a state court interpretation of state election laws to the current state election, where that decision upholds rather than restricts the right to vote?

LIST OF PARTIES

John Davis, on behalf of himself and all others similarly situated, is the Petitioner and is a defendant below. The defendant class on behalf of whom he was sued was described by the plaintiffs as the "class of persons who sought to have their ballots counted in an action in the Circuit Court of Montgomery County [Alabama] under the style *Odom v. Bennett*, No. CV 94-2434."

Larry Roe, Perry O. Hooper, Sr., and James D. Martin are Respondents and are plaintiffs below.

The remaining Respondents, defendants below, are the State of Alabama; James Bennett in his official capacity as Secretary of State of the State of Alabama; Mobile County Appointing Board; Wilcox County Appointing Board; Lionel W. Noonan in his official capacity as Probate Judge of Mobile County, Alabama; Jerry Boggan in his official capacity as Probate Judge of Wilcox County, Alabama; all Probate Judges in the State of Alabama in their official capacities (who are, according to the Amended Complaint, Cordy Taylor, Harry D'Olive, W. Mack Price, Glenn Lightsey, Frank J. Green, Rufus Charles Huffman, Sr., Calvin Steindorff, Arthur C. Murray, Emerson Thompson, Philip Jordan, Robert M. Martin, Charles V. Ford, Clarence Watters, Douglas Hamlin, Mac Smith, Marion Brunson, W. Thomas Crosslin, Rogene Booker, Jasper Fielding, Sherrie R. Phillips, Dwight Faulk, Tom Burleson, Curt Head, John W. Jones, Jr., Paul Thomas, Edward W. Enslen, Devon Wiggins, Bobby Junkins, William Oswalt, Larry N. Jackson, Harold B. Wise, Earlean Isaac, E. Riley Lucas, Jackey T. Harpe, Cletus N. Youmans, Robert I. Gentry, George R. Reynolds, Ted Boyett, William L. Hanbery, Richard I. Proctor, Hal Smith, Michael L. Davis, O.P. Woodruff, Alphonso Menefee, Frank H. Riddick, Jr., Cindy Hopkins, Annette Bozeman, Tim Mitchell, Lionel W. Noonan, Otha Lee Biggs, Walker Hobbie, Jr., Bobby G. Day, Donald Cook, Roy Kelly, John W. Gibson, Mack Diamond, Lee Lott, Thomas A.

Snowden, Jr., Wallace Wyatt, Jr., Sam Massingill, Donald Fox, W. Hardy McCollum, Stanley Wade, Tom W. Turner, Jerry Bogan, and Billy C. Ford); all Sheriffs in the State of Alabama in their official capacities (who are, according to the Amended Complaint, James W. Johnson, Jimmy Johnson, Robert Smith, Bob Rinehart, Larry Staton, H.O. Williams, Joe C. Sanders, Roy C. Snead, Jr., James C. Morgan, Roy Wynn, Neely Strength, Donald F. Lolley, Ray Sheffield, Ralph Toland, Darrell Durham, Brice R. Paul, John L. Aldridge, Edwin Booker, William A. Evans, Wilbur Mitchell, Robert Colquett, David C. Laney, Bryant Mixon, Bill Franklin, Timothy A. Hawsey, James Hayes, James Turner, Larry Plott, Douglas Whittle, George Hall, Larry G. Johnson, Lawton Ed Armstrong, Lamar Hadden, Mike Wells, Melvin Bailey, Terry Perkins, Billy Townsend, Grady Rose, Herman Chapman, Mike Blakely, Willie Vaughner, Elbert Dawson, Joe W. Patterson, Roger Davis, J. Max Brashier, Edsel Whitten, Thomas J. Purvis, Thomas Tate, Dan Jones, Steve Crabbe, James Hood, David Abston, Harold Anderson, Larry Colley, Thomas F. Boswell, James Jones, Lewis Brown, Melvin Stephens, Jerry Studdard, Joe Smith, Joe B. Robertson, William J. Wheat, Prince Arnold, and Hobby Walker); and all Circuit Clerks in the State of Alabama in their official capacities (who are, according to the Amended Complaint, Fred Posey, Jackie Calhoun, David S. Nix, R.L. Foster, Michael E. Criswell, Curtis J. Elzie, Bobby T. Branum, Barbara Craft, Phyllis Cumbee, Carolyn M. Smith, Mike Smith, Wayne Brunson, Robert Giddens, Horace D. Perry, Jim Ellis, C. Phillip Bowling, Jean E. Riley, Roger A. Powell, Ann W. Tate, Robert G. Bates, Bettye B. Garrett, W.A. Kynard, Jimmy Lindsey, Earl Sayers, James D. Taylor, Bill S. Yates, James E. Renfroe, J.T. Newton, Veleria Thomley, Johnnie Knott, Connie Burdenshaw, Julia L. Trant, Leonard V. Griggs, Polly Conradi, Carl F. Woods, Kenneth C. Austin, W. Larry Smith, Annette H. Hardy, Charles Page, Jr., Elsie Davis, Eddie D. Mallard, Billy

D. Harbin, Dewaine Sealy, James O. Garrard, Jean Albert Scott, Susan F. Wilson, John Sawyer, Debra P. Hackett, Cleo D. Teague, Mary C. Moore, Jack T. Pate, Brenda M. Peacock, Kim S. Benefield, Devon Kiker, Dan Reeves, Jean Browning, Carole Smith, Samuel L. Grice, Frank Lucas, Doris T. Turner, Vinita B. Thompson, Jackie B. Howard, Willie Powell, and W.F. Bailey).

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PETITION FOR WRIT OF CERTIORARI

Petitioners John W. Davis and the class he represents respectfully pray that a writ of certiorari issue to review the April 26, 1995, order and mandate of the United States Court of Appeals for the Eleventh Circuit, *Roe v. Alabama*, 52 F.3d 300 (11th Cir. 1995).

OPINIONS BELOW

The April 26, 1995, decision of the United States Court of Appeals for the Eleventh Circuit, to be reported at 52 F.3d 300 (11th Cir. 1995) ("*Roe III*"), is

reproduced in Appendix A (1a-13a). The initial January 5, 1995, opinion of a panel of the Eleventh Circuit is reported at 43 F.3d 574 (11th Cir. 1995) ("*Roe I*"), and is reproduced in Appendix B (14a-40a). In that decision, the panel certified an issue to the Supreme Court of Alabama. The March 14, 1995, decision of the Alabama Supreme Court, to be reported at —— So.2d —— (Ala. 1995) ("*Roe II*"), is reproduced in Appendix C (41a-162a). The preliminary injunction entered on December 5, 1994, by the U.S. District Court for the Southern District of Alabama is not officially reported but is reproduced in Appendix D (163a-168a).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 26, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 4 of the United States Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." There is no provision in the Constitution which specifically governs state elections, and Congress has passed no law requiring that an absentee ballot be notarized or that it have two witnesses.[1]

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[1] In fact, Congress has prohibited states from imposing a strict notarization requirement for absentee voting. *See* Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee-3(b).

The Tenth Amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Fourteenth Amendment provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Introduction

This case involves fundamental issues of federalism, federal court jurisdiction, and Constitutional law. The issues grow out of the November 1994 general election for state offices in the State of Alabama. The dispute between the parties has its roots in whether the State of Alabama can count, and can include in certified election results, a certain group of absentee ballots which comply in every respect with state law, as construed by its highest court. This petition is submitted on behalf of approximately 1700 to 2000 absentee voters (the Davis class) who seek to have their votes counted as state law indisputably requires and as the state courts have ordered.

The U.S. District Court for the Southern District of Alabama, and the U.S. Court of Appeals for the Eleventh Circuit, have injected themselves into this ballot-counting dispute in this election for state elective offices, even though the entire weight of federal jurisprudence teaches that state control over state elections is fundamental to our system of federalism.[2] They have issued, and affirmed, a preliminary injunction against the opening and counting of the votes of the Davis class. They have

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[2] *See, e.g., Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986); *Hubbard v. Ammerman*, 465 F.2d 1169 (5th Cir. 1972); *Pettengill v. Putnam County R-1 School Dist.*, 472 F.2d 121 (8th Cir. 1973); *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970); *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980); *Hutchinson v. Miller*, 797 F.2d 1279, 1283 (4th Cir. 1986).

done so in a case which is merely a direct attack on an order of a state court in ongoing litigation, in violation of the *Rooker-Feldman*[3] doctrine and every principle of abstention and other doctrines of federalism. They have done so on the unprecedented and unsupportable theory that some persons can have a due process right under the Fourteenth Amendment to disenfranchise the Davis class, even though the Davis class's votes are due to be counted under state law as construed by the State's highest court. They have done so, even though no one knows whether the Davis class's votes will even affect the outcome of the election; and no one will ever know that, until after all of the Davis class's votes are counted and after state election contest proceedings have concluded.

If allowed to stand, the decision below will invite and indeed mandate federal judicial intervention in a wide array of state election disputes, in which heretofore the federal courts have wisely and appropriately stayed out of the fray. Because this case is so important to our system of federalism, and to the public perception of the federal courts as an apolitical institution, it is critical that this Court put a halt to this exercise by granting the writ of certiorari to the Court of Appeals for the Eleventh Circuit, rather than waiting for further proceedings in the District Court to run their course, past the preliminary injunction stage.[4] The process of ongoing

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[3] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303 (1983).

[4] The parties have just begun a time-consuming, burdensome and expensive discovery process, to answer the 17 questions in the final order of the Eleventh Circuit. That order requires discovery and ultimately evidence on the voting practices in each of the 67 counties in Alabama. Trial is set for September 19, 1995. If this Court does not act now to grant certiorari and stay proceedings in the Courts below, the parties will expend enormous resources in the federal court proceedings.

federal court intervention itself—and not merely the ultimate outcome after proceedings on remand, whatever it may be—is an integral part of the wrong here.

B. Statement of Facts and Course of Proceedings in the Lower Courts

This case involves the November 8, 1994, general election in Alabama, most particularly with regard to the race for Chief Justice of the Alabama Supreme Court.[5] That race is very close, with only 262 votes separating the two principal candidates if one excludes the Davis class's absentee ballots, according to the most recent figures from Alabama's Secretary of State. Because of this litigation, there are no official returns and no victor has been certified in that race.

This litigation, and the other litigation discussed herein, concern whether certain absentee ballots should be counted. Those are the ballots of the Petitioner Davis class. According to unofficial returns, the results of the Chief Justice race *could* be affected by those ballots, if they are counted—but at this point no one knows, because the District Court and the Court of Appeals for the Eleventh Circuit have forbidden anyone from finding out.[6]

The procedural history of this case begins in state court. A Montgomery, Alabama, state trial court judge, the Honorable Eugene Reese, issued a preliminary injunction shortly after the general election requiring the

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[5] While this litigation also involves the office of State Treasurer, there is really no dispute but that Ms. Baxley, the Democratic candidate, is the victor, with or without the votes in question. For this reason, the Republican Governor appointed her to office when the previous Treasurer resigned.

[6] While the Eleventh Circuit's April 26, 1995, opinion might be interpreted to allow the counting of the Davis class ballots in order to see whether they affect the outcome of the Chief Justice race, the District Court on remand has rejected that interpretation.

Secretary of State to include, in the official vote counts, absentee ballots which were signed by the voter but were not also notarized or witnessed by two persons. That injunction was issued in litigation brought by John Davis (Petitioner herein, on behalf of the class of similarly situated voters) and another voter. The injunction was based on the holding that such absentee ballots complied with the requirements of Alabama law, and that Alabama law required that such ballots be counted. The injunction followed decades of Alabama case law holding that "substantial compliance" with voting statutes is sufficient to require that ballots be counted.[7] The Alabama Republican Party was a party to that litigation at the time the injunction was issued, and at all times since. The Republican Party could have appealed Judge Reese's injunction to the Alabama Supreme Court, but chose not to. Counsel for the Republican Party admitted in open court that the decision not to appeal that injunction to the Alabama Supreme Court was made for "strategic" reasons. *See* Ala. S.Ct. Slip Opinion, *Roe II*, at 6 (Appendix at 45a).

Shortly after Judge Reese issued that injunction, the plaintiffs in this case—the Republican candidates for Treasurer and Chief Justice, and a member of the Executive Board of the State Republican Party—sought an order from the U.S. District Court for the Southern District of Alabama that the Davis class's votes not be counted, on the theory that Judge Reese's order was unconstitutional. Those plaintiffs are represented by, among others, the same attorney who represented the Republican Party in the state court litigation.[8] The Davis

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[7] *See, e.g., Garrett v. Cunninghame*, 211 Ala. 430, 438, 100 So. 845, 853 (1924); *Campbell v. Jefferson County*, 216 Ala. 251, 113 So. 230 (1927); *Wells v. Ellis*, 551 So.2d 382 (Ala. 1989); *Williams v. Lide*, 628 So.2d 531, 536 (Ala. 1993).

[8] Those same attorneys had previously attacked Judge Reese's order in a Voting Rights Act suit brought in the U.S. District

class was made a defendant in this federal litigation. Within five working days after the Republican plaintiffs sought such relief in federal district court, the, district court held a preliminary injunction hearing and issued a preliminary injunction requiring the Secretary of State to certify the results of the Chief Justice race (and the Treasurer's race) *without* the Davis class's ballots, even though such relief had not been requested in the pleadings. This injunction was based on the district court's preliminary understanding that such unnotarized and unwitnessed ballots had not been counted in the past, and on the district court's "finding" that Judge Reese was wrong as a matter of state law. The injunction was further based on the legal assertion that the plaintiffs had a right under the Due Process clause of the Fourteenth Amendment, asserted through 42 U.S.C. § 1983, to disenfranchise the Davis class. *There was not, and still is not, any shred of evidence that many such ballot is fraudulent in any way, or that any such ballot was cast by anyone other than a qualified voter. Despite the resort to hyperbole by the respondents, there is no evidence of "ballot box stuffing".*

The Davis class, and the State of Alabama and government official defendants, appealed the preliminary injunction to the U.S. Court of Appeals for the Eleventh Circuit. A divided panel of that Court issued an interim decision, *Roe v. State of Alabama*, 43 F.3d 574 (11th Cir. 1995). The panel majority indicated that the counting of the Davis class's ballots would violate the Fourteenth Amendment Due Process clause, because (it asserted) such votes had not been counted in past Alabama elections. The panel majority then certified to the Alabama Supreme Court the question whether such bal-

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Court for the Northern District of Alabama, in Birmingham. When the Northern District refused to enjoin the enforcement of Judge Reese's order, the attorneys moved their focus to this suit, in the Southern District in Mobile.

lots were due to be counted under Alabama law. In the interim, the panel ordered that the Davis class ballots not be counted, and that no results be certified in the Chief Justice or Treasurer races. The panel majority rejected the defendants' arguments, including (i) that there is no federal right in some voters to disenfranchise others who are undisputably qualified voters; (ii) that the federal suit was barred by the *Rooker-Feldman* doctrine and *Pullman* abstention; (iii) that no federal intervention was appropriate before the Davis class ballots were counted (that is, before anyone knows whether those ballots would even affect the outcome of any race); and (iv) that the panel majority was simply wrong about prior election practice in Alabama, and that unnotarized and unwitnessed ballots had been counted in the past—and indeed were counted in the 1994 election—in many Alabama counties (and thus that there was no basis for a Due Process bar to their being counted in this election). With regard to the last point, the panel majority even went so far as to indicate that the preliminary injunction could be treated as a final one—even though it was issued only days after the plaintiffs first raised their claims, and even though there was no notice that the preliminary injunction hearing would be considered a final hearing on the merits.

Circuit Judge Edmondson dissented from the panel majority decision, recognizing its detrimental impact on our system of federalism. He wrote, in part:

> I know of no other case involving disputed ballots in which a federal court has intervened in a state election where the plaintiff failed to show, in fact, either:
>
> 1. that plaintiff had "lost" the election but would have won the election if lawful votes only had been counted (that is, the alleged constitutional error changed the election results); or
>
> 2. that it was impossible ever to know that his opponent (the apparent winner) had truly

> won the election because of the nature of the voting irregularities (that is, the alleged constitutional error placed in everlasting doubt what was the true result of the election).

Nothing is known in this case about whether the alleged illegalities have affected or will affect the outcome of the pertinent elections. Yet today we plow into Alabama's election process and uphold a preliminary injunction that, in effect, overrules a preexisting state court order which had directed that the contested votes be counted. And, instead, the federal courts (basically, stopping short the state election process) order that the contested votes be *not* counted at all. This high level of federal activity seems unnecessary and, therefore, improper. So, I conclude that the district court abused its discretion.

. . .

This difference with my colleagues is more than just academic bickering about technicalities. Federal courts are not the bosses in state election disputes unless extraordinary circumstances affecting the integrity of the state's election process are clearly present in a high degree. This well settled principle—that federal courts interfere in state elections as a last resort—is basic to federalism, and we should take it to heart.

. . .

Some of the ideas expressed in today's court opinion are, to me, doubtful: such as the theory that Alabama's legislature has the power in election contests to act contrary to the law of Alabama as declared by Alabama's highest court; the conclusion that an election contest before the legislative commission is inadequate to determine the legal issues raised by plaintiffs; the thought that only absolute identity of parties in the state court action and federal court action (without regard to state-case parties possibly under the control of or in privity with federal-case parties)

> will trigger a *Rooker-Feldman* bar in federal court; and the perception that a federal court order that countermands a pre-existing Alabama court order maintains the status quo in Alabama.

Roe II, 43 F.3d at 585-86 (Edmondson, J., dissenting).

On March 14, 1995, the Alabama Supreme Court issued its decision on the question certified to it by the panel majority. In that opinion, *Roe v. Mobile County Appointing Bd.*, —— So.2d —— (Ala. 1995), the Alabama Supreme Court squarely held that the Davis class's ballots were due to be counted, and required to be counted, under Alabama law. The Court emphasized that *if* there were ever any evidence that any such ballot was fraudulent, then Alabama law permitted and required that such evidence be addressed in an election contest (which, for the Chief Justice position, would be in the Alabama legislature).

Equally importantly, the Alabama Supreme Court transmitted to the Eleventh Circuit a copy of the record in the state court litigation, which had become more fully developed since the hastily-convened federal court injunction hearing and since the issuance of the Eleventh Circuit's interim decision. As that record shows, and as the Alabama Supreme Court recognized, it is undisputed in the evidence that ballots just like those of the disenfranchised Davis class—that is, not notarized or witnessed—have been counted in many Alabama counties in previous elections, *and were counted in some Alabama counties in the 1994 election.*

The Alabama Supreme Court also stated its strong belief that the federal courts' intervention into this matter—when state court litigation was ongoing—was an affront to the basic values of federalism and comity between state and federal courts. On every critical point in the panel majority's interim opinion, the Alabama Supreme Court issued a well-detailed and exhaustive show-

ing of how the panel majorty's action conflicted with long-standing law.

After receipt of the Alabama Supreme Court's decision, the panel of the Eleventh Circuit issued another decision, *Roe v. State of Alabama*, 52 F.3d 300 (11th Cir. 1995). Without explanation or discussion of any legal issue involved, the panel "remand[ed] these proceedings to the district court for a trial on the merits." *Id.* at 301. The Eleventh Circuit set forth an extensive but not exclusive list of factual inquiries to be addressed through discovery and trial.

The Davis class brings this Petition at this time in order to avoid further months of disruption and delay to the State's electoral system. Rather than putting the parties and the lower courts to the inordinate time and expense of lengthy pre-trial and trial proceedings, the Davis class seeks to establish that this case should be dismissed now as a matter of law. Only in that way can the ongoing affront to core values of federalism be alleviated.

REASONS FOR GRANTING THE WRIT

The State of Alabama has decided that absentee ballots in its state elections are to be counted even if they are not notarized nor witnessed by two witnesses. That was the interpretation of state law which state trial judge Reese reached, and that was likewise the interpretation of state law which the Alabama Supreme Court reached. Those state courts—the trial court and the high court—therefore ruled that if some state and local officials had been acting under a contrary (which is to say, erroneous) understanding, they should conform their behavior to the law and count the ballots of the Davis class.

In the most basic sense, the question in this case is whether the lower federal courts can and should overrule state trial court Judge Reese and the Alabama Supreme Court in this regard, and disenfranchise the Davis class.

More particularly, this case presents two sets of issues. The first set, issues 1 through 3, have mostly to do with the relations between state and federal courts and with federal court jurisdiction. The second set, issues 4 and 5, have mostly to do with substantive constitutional law under the Fourteenth Amendment; these issues, like the first set, raise important issues of federalism.

All of these issues are of fundamental importance, and on all of them the decision below conflicts with decisions of this Court and other courts. The writ of certiorari should issue for the following reasons.

1. It is, first, important to reiterate the theme that recurs through all of the issues in this case: the theme of American federalism. No issue is more important to the health of our nation than a proper balance between states and the federal government. This Court has recently and increasingly been called upon to maintain that proper balance, most notably this Term in *U.S. v. Lopez*, —— U.S. ——, 115 S.Ct. —— (April 26, 1995) and *U.S. Term Limits v. Bryant*, —— U.S. ——, 115 S.Ct. —— (May 22, 1995). In *Lopez* and *Bryant*, as in other decisions throughout this nation's history, this Court has delineated the proper spheres of state and federal authority, recognizing that the presuppositions of our political history, and our written Constitution, place some issues squarely within the control of the states and others within federal control.

This case involves the area of law which, more than any other, is both historically and constitutionally reserved to the states: the control of elections for state elective offices, and in particular the decision as to the mechanics of such elections. This is the most fundamental aspect of sovereignty: the power to determine how the government is structured and chosen. Even with regard to elections for federal office, the Constitution explicitly reserves to the states in the first instance the power to control the mechanics of such elections. *See*

Article I, Section 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . ."). The mechanics of elections for *state* officials (such as Chief Justice of the State Supreme Court), even more so than for Congress, are clearly within the scope of the Tenth Amendment's declaration that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As Justice Black wrote, the Constitution was

> intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, excepts insofar as the Constitution itself demands otherwise. . . . [T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections. . . No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own votes for state, county and municipal offices and the nature of their own machinery for filling local public offices. . . . It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States.

Oregon v. Mitchell, 400 U.S. 112, 124-25, 91 S.Ct. 260, 265 (1970).

Thus prior federal decisions are in accord that federal court intervention in state elections—and particularly with regard to the mechanics of the elections, such as the marking and casting of ballots—should come only with great hesitation, in the most extreme cases, and upon clearest constitutional or statutory authority. *See, e.g., Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986);

Hubbard v. Ammerman, 465 F.2d 1169 (5th Cir. 1972); *Pettengill v. Putnam County R-1 School Dist.*, 472 F.2d 121 (8th Cir. 1973); *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970); *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980); *Hutchinson v. Miller*, 797 F.2d 1279, 1283 (4th Cir. 1986).[9]

Against this background of the federal courts' uniform reluctance to interject themselves into disputes over the mechanics of state elections, the decision below is extraordinary and worthy of this Court's review. It represents either an ad hoc and inexplicable violation of long-standing principles of federalism, or a harbinger of a new tradition of federal judicial activism in state election disputes. In either event, it is worthy of this Court's consideration and full review.

2. As to issues 1 through 3, the decision of the U.S. Court of Appeals for the Eleventh Circuit conflicts with the decision of the Supreme Court of Alabama, and with decisions of other courts including this Court, on important questions of federal law which should be decided by this Court.

The first issue concerns the scope of the *Rooker-Feldman* doctrine, which reserves to this Court alone among the federal courts the jurisdiction and power to review state court decisions. Even though this case is simply and clearly an attack on Judge Reese's order that

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[9] Since the adoption of the Fourteenth and Fifteenth Amendment there is certainly some room for federal authority over state elections, and even over the mechanics of electoral processes, where there is a claim or evidence of discrimination. Likewise, the Congress has the authority to enact legislation pursuant to those Amendments, such as the Voting Rights Act of 1965, which impacts upon the mechanics of state elections. The decision below, however, does not purport to be based on the Voting Rights Act of 1965 or any other similar legislation. It does not even purport to be based on the Equal Protection clause of the Fourteenth Amendment, or on the Fifteenth Amendment; there is no hint that Judge Reese's order or the Alabama Supreme Court's decision are racially discriminatory.

the Davis class's ballots be counted, and even though Republican counsel before Judge Reese is also Republican counsel in the federal litigation, the panel majority concluded that the *Rooker-Feldman* bar did not apply because the Republican *Party* was the party before Judge Reese and (by slight contrast) the Republican *candidates* and a Republican Party *officer* are the parties to the federal attack. *Roe I*, 43 F.3d at 580, Appendix at 24a. The dubiousness of this conclusion, and its deservingness of this Court's review, are shown by (a) Judge Edmondson's expressed doubts as to its correctness (43 F.3d at 586, Appendix at 40a); (b) the precisely contrary decision by the Alabama Supreme Court (*Roe II*, Appendix at 64a); and (c) the fact that this Court has rejected such a formal distinction in the closely analogous *Younger* abstention context, *see Hicks v. Miranda*, 422 U.S. 332, 348-49, 95 S.Ct. 2281, 2291-92 (1975).

The second issue raises related concerns, invoking not only *Rooker-Feldman* doctrine but also other related abstention doctrines. This second issue, as well as the third, also emphasize that federal court intervention is at the very least premature—and is, more to the point, beyond the federal courts' Article III jurisdiction over cases and controversies. This is so, because no one yet knows even whether the Davis class's ballots will affect the outcome of the Chief Justice's race; and because state law provides for post-election procedures such as an election contest (which, as to the Chief Justice race, would take place in the Alabama legislature) which could also dispositively affect the outcome of the Chief Justice race for reasons having nothing to do with the Davis class's ballots. On these issues as well, the Alabama Supreme Court after careful consideration reached conclusions completely opposite to those of the Eleventh Circuit [10], and this Court should review the case in order to resolve this conflict.

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[10] As the Alabama Supreme Court explained, Appendix at 67a-68a, "No one in Alabama or anywhere else knows who will win the

In short, this Court should act now to resolve this important conflict between the Supreme Court of Alabama and the Eleventh Circuit. These are issues of law which will not depend on further fact-finding below; they are ripe for decision now. Indeed, further proceedings below are *themselves* the harm to our system of federalism which this Court should avoid. For these reasons, the writ should be granted.

3. As to issues 4 and 5—which are, so to speak, the questions of substantive constitutional law "on the merits,"—the decision below likewise raises important issues and conflicts with many other decisions. In fact, the decision below is without precedent: the Eleventh Circuit has held that some voters have a constitutional *right*, under the Due Process clause of the Fourteenth Amendment, to disenfranchise other qualified voters whose ballots complied with state law as construed by the State Supreme Court. The Eleventh Circuit has held that if election officials had in the past been acting under a misapprehension of what state law required—and had therefore been erroneously excluding ballots which should have been counted—the Due Process clause forbids the state courts from correcting that mistake in the context of this election.

Even if one joined the plaintiffs' and the Eleventh Circuit's erroneous assumption that counting the Davis class's ballots would constitute a change from a uniform prior practice, *still* the decision would be without precedent and

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election for Chief Justice when the uncounted ballots are counted. The results of the election have not been determined. The winner has not been certified. The loser, when the result is determined, has a statutory . . . right to contest the election in the state legislature. As a practical matter, it is only after all of the votes have been counted, the election results have been certified, and either the time for an election contest has elapsed, or a contest has been concluded that conclusive effect is given to the ballots cast in an election. . . . Plaintiffs' contention that they will suffer a deprivation of their due process rights when these absentee ballots are counted is pure speculation."

would indeed conflict with the most closely analogous federal decision, *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980), *cert. denied*, 451 U.S. 985 (1981). *Partido Nuevo Progresista* involved a decision by the Puerto Rico Supreme Court that a certain class of ballots, marked in a certain way, should be counted. In that case, as here, the plaintiffs contended that such ruling amounted to a change from prior practice; they contended, as do the plaintiffs here, that the Due Process clause of the Fourteenth Amendment forbade such a "change." The U.S. Court of Appeals for the First Circuit rejected their claim in no uncertain terms. Similarly, the Eighth Circuit was confronted with a claim that voters' due process rights were violated by alleged voting irregularities, including that "116 electors cast absentee ballots which were void since there were irregularities in the application, delivery, or execution of these ballots." *Pettengill v. Putnam County R-1 School Dist.*, 472 F.2d 121 (8th Cir. 1973). The Eighth Circuit resoundingly rejected the claim and held that there was no federal jurisdiction: "Appellants attempt to posit the existence of federal jurisdiction on the theory that the board of education . . . has diluted appellants' legal votes by counting illegally cast votes and that such (state) action amounts to a deprivation of appellants' civil rights. We reject this theory. Appellants cite no cases, and we have found none, which authorize a federal court to be the arbiter of disputes over whether particular persons were or were not entitled to vote or over alleged irregularities in the transmission and handling of absentee voter ballots." *Id.* at 122. The Eleventh Circuit panel decision in this case thus creates a stark split in the Circuits.

The other Circuits clearly have the better of this argument. As discussed above, the mechanics of state elections are squarely reserved for state control except where some specific constitutional (or perhaps clear statutory) command is violated. Here, however, the Eleventh Circuit's theory is not based on any concrete or specific con-

stitutional (or even statutory) basis but is instead simply an unprecedented theory built loosely on the Due Process clause, and presumably on so-called "substantive" due process (for it is hard to imagine what further procedure one could hope for than a decision of the Alabama Supreme Court after full briefing). It thus calls to mind—and, more to the point, violates—this Court's admonition about substantive due process:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and openended. . . . The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. City of Harker Heights, Tex., —— U.S. ——, ——, 112 S. Ct. 1061, 1068 (1992). It is, of course, impossible to find in the text of the Due Process clause any "right" to disenfranchise other qualified voters. *Cf. U.S. Term Limits v. Bryant*, —— U.S. at ——, 115 S.Ct. at —— (Thomas, J., dissenting) ("[W]here the Constitution is silent, it raises no bar to action by the States or the people."). It is equally impossible to find such a "right" in the history or purpose of the clause. There is no sense in which it deprives the plaintiffs of "life, liberty or property"—and certainly not "without due process of law"—to count ballots which were cast by qualified voters and which comply fully with state law.

The Eleventh Circuit in this case sought to bolster its unprecedented Due Process theory, by suggesting that a "change" towards counting unnotarized and unwitnessed ballots would be unconstitutional because some voters and candidates might have relied on their prior understanding that such ballots would not be counted. This rationale should not dissuade this Court from granting review; instead, the rationale itself raises further important issues of jurisprudence which also counsel in favor of this Court's review. That is, the Eleventh Circuit's *sua sponte*

invocation of some supposed "reliance interest"—the notion that a state court is constitutionally prohibited from requiring state officials to abide by state law, simply because some citizens might have misunderstood state law themselves—conflicts with the principles which this Court has recently been establishing and reiterating regarding the nature of judicial decisions and the "retroactivity" thereof. The Eleventh Circuit's suggestion, that the rulings by Judge Reese and the Alabama Supreme Court amounted to a "change" in the law, conflicts with this Court's expressed understanding of the nature of a judicial interpretation of a statute: "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express Inc.*, —— U.S. ——, ——, 114 S.Ct. 1510, 1519 (1994). And the Eleventh Circuit's suggestion, that even if the law of Alabama is now settled in favor of counting these ballots it cannot constitutionally be applied to *this* election, conflicts with this Court's recent and continuing emphasis that judicial decisions not only *can*, but *should*, be applied "retroactively" even if some claim to have relied on their own prior misunderstanding of the law. *E.g.*, *Reynoldsville Casket Co. v. Hyde*, —— U.S. ——, 115 S.Ct. ——, 63 U.S.L.W. 4408 (1995).

In short, the Eleventh Circuit's suggestion that the Due Process clause grants the plaintiffs a right to disenfranchise the Davis class is without precedent. It is in direct conflict with a decision from the First Circuit, and conflicts with jurisprudential principles which this Court has continually reemphasized in recent cases. This Court should grant review, lest the Eleventh Circuit's decision mark the beginning of a new era of federal judicial intervention in a wide range of state election disputes.

4. Having litigated this case for some months now, we anticipate most if not all of what the Respondents will say in opposition to this Petition. Here, we will try to set the record straight in advance.

First, this case is not in any sense about "stuffing the ballot box," as the Respondents are fond of charging. There is, again, *no evidence of any fraud whatsoever with regard to any ballot, and no evidence that any absentee ballot was cast by anyone other than a qualified voter*; obviously, if there ever *is* such evidence, it can be raised (as the Alabama Supreme Court held) through a state-law election contest. This case is merely about whether a certain class of ballots, cast by qualified voters on election day, will be counted as state law requires.

Second, the Respondents may suggest to this Court that state trial court Judge Reese, and the Alabama Supreme Court, were engaged in some politically-motivated kind of decisionmaking rather than deciding questions of state law to the best of their honest abilities. We trust that the Justices of this Court will treat such disrespectful attacks with the scorn they deserve. The plaintiffs, who have repeatedly made such attacks, should be reminded of the "full faith and credit" provisions of Article IV Section 1 and of 28 U.S.C. § 1738, as well as central principles of comity. Certainly this Court does not sit to indulge political attacks on state supreme courts.

Third, the decision of the Alabama Supreme Court in response to the question certified to it by the Alabama Supreme Court was, in fact, a decision of the Alabama Supreme Court (and not, as some Respondents are fond of implying, merely a decision by four of the nine justices). Of the nine justices, Chief Justice Hornsby and Justice Houston recused themselves, leaving seven justices competent to hear the case. Five did so, of whom four joined the per curiam decision of the Court. Four is obviously a majority of five, and is equally obviously a majority of seven; and so the decision was a decision of the Alabama Supreme Court. *See* Ala. R. App. P. 16(b): "The concurrence of five justices in the determination of any cause shall be necessary and sufficient thereto, except when, by reason of disqualification the number of justices competent to sit therein is reduced, in which event the

concurrence of a majority of the justices sitting shall suffice." Nor was there any need for the appointment of a special court under Ala. Code § 12-2-14 (1975) because only two justices were disqualified. We regret having to burden this Court with these intricacies of state law, because (having been decided at least implicitly by the Alabama Supreme Court) they are irrelevant to any issue properly before this or any other federal court in this case; the only reason we mention these points is to forestall obfuscation by the Respondents.

Finally, the Respondents, trying to downplay the unprecedented nature of the Eleventh Circuit's decision in this case, will once again try to suggest that this case is analogous to *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). This willfully ignores the fundamental distinction between *disenfranchising* voters (which does indeed rise to the level of a constitutional deprivation in some circumstances, perhaps including *Griffin*) and *counting the ballots of qualified voters when state law so requires* (which has, so far as we are aware, never before been held to violate anyone's constitutional rights). This is the distinction which the First Circuit drew in *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980), *cert. denied*, 451 U.S. 985 (1981), in distinguishing its own prior opinion in *Griffin* and holding that there was no constitutional claim. As the Davis class has shown above, the conflict between this case and *Barreto Perez* is one of the primary reasons for this Court's review.

5. The issues involved in this case are the most important ones in our democracy: the right to vote, and the proper role of the federal judiciary in our system of federalism. As discussed above, the considerations set forth in Supreme Court Rule 10.1 strongly support the grant of a writ of certiorari, as the decision of the Eleventh Circuit conflicts with that of the Alabama Supreme Court in this same case and with those of other federal courts in similar cases. Even if there were no conflict between the Eleventh Circuit and the Court of last resort in Alabama,

and even if there were no conflict between the Eleventh Circuit and the other Circuits, the issues in this case are of such importance that this Court should exercise its discretion to grant a writ of certiorari. The State of Alabama is justified in deciding, as a matter of state law, that it should count absentee ballots which are not notarized or witnessed but which substantially comply with the requirements of Alabama law. This Court should protect the basic principles of federalism which allow States to make such decisions. The courts below have infringed upon our system of federalism in a way that cannot be allowed to stand, even through further proceedings below. This Court should grant the writ of certiorari now, in order to avoid further disruption of our system of federalism.

CONCLUSION

For the reasons stated herein, Petitioner John Davis and the class of disenfranchised voters whom he represents respectfully request that this Court grant the writ of certiorari to review the decision of the U.S. Court of Apeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A

[Filed Apr. 26, 1995]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 94-7155 and 94-7138

D.C. Docket No. CV 94-885-AH-S

LARRY ROE, PERRY O. HOOPER, SR., JAMES D. MARTIN,
Plaintiffs-Appellees,

versus

STATE OF ALABAMA, By and through its Attorney General JAMES EVANS,
Defendant-Appellant,

JAMES BENNETT, Honorable Alabama Secretary of State,
Defendant-Appellant,

JOHN W. DAVIS, a representative of a class of persons who have sought to have their ballots counted in an action in the Circuit Court of Coosa County, Alabama,
Defendant-Appellant,

MOBILE COUNTY APPOINTING BOARD,
LIONEL W. NOONAN,
Defendants,

WILCOX COUNTY APPOINTING BOARD,
JERRY BOGGAN,
Defendants-Appellants,

O.P. WOODRUFF, Honorable Probate Judge of Lowndes, County, WILLIE VAUGHNER, Honorable Sheriff of Lowndes County, *et al.*,

Defendants.

ELSIE DAVIS, Honorable Circuit Clerk of Lowndes County, W.A. KYNARD, Honorable Circuit Clerk of Dallas County, MARY C. MOORE, Honorable Circuit Clerk of Perry County, CURTIS J. ELZIE, Honorable Circuit Clerk of Bullock County, DAVID S. NIX, Honorable Circuit Clerk of Barbour County, DEVON KIKER, Honorable Circuit Clerk of Russell County, EDDIE D. MALLARD, Honorable Circuit Clerk of Macon County, DEBRA P. HACKETT, Honorable Circuit Clerk of Montgomery County, BARBARA CRAFT, Honorable Circuit Clerk of Calhoun County, POLLY CONRADI, Honorable Circuit Clerk of Jefferson County, BILLY S. YATES, Honorable Circuit Clerk of Etowah County, EARL CARTER, Honorable Circuit Clerk of Jefferson County, Bessemer Division, CAROLYN M. SMITH, Honorable Circuit Clerk of Cherokee County, JEAN BROWNING, Honorable Circuit Clerk of St. Clair County, SAMUEL L. GRICE, Honorable Circuit Clerk of Talladega County, JACKIE CALHOUN, Honorable Circuit Clerk of Baldwin County, JACKIE B. HOWARD, Honorable Circuit Clerk of Washington County, SUSAN F. WILSON, Honorable Circuit Clerk of Mobile County, DONALD R. GIBSON, Honorable Circuit Clerk of Choctaw County, WAYNE BRUNSON, Honorable Circuit Clerk of Clarke County, JOHN SAWYER, Honorable Circuit Clerk of Monroe County, JAMES D. TAYLOR, Honorable Circuit Clerk of Escambia County, BRENDA M. PEACOCK, Honorable Circuit Clerk of Pike County, ANN W. TATE, Honorable Circuit Clerk of Crenshaw County, BOBBY T. BRANUM, Honorable Circuit Clerk of Butler County, JEAN E. RILEY, Honorable Circuit Clerk of Conecuh County, JULIA L. TRANT, Honorable Circuit Clerk of Houston County, JIM ELLIS, Honorable

Circuit Clerk of Coffee County, ROGER A. POWELL, Honorable Circuit Clerk of Covington County, CONNIE BURDESHAW, Honorable Circuit Clerk of Henry County, WILLIE POWELL, Honorable Circuit Clerk of Wilcox County, VELERIA THOMLEY, Honorable Circuit Clerk of Geneva County, BETTYE B. GARRETT, Honorable Circuit Clerk of Dale County, VINITA B. THOMPSON, Honorable Circuit Clerk of Walker County, JAMES E. RENFROE, Honorable Circuit Clerk of Fayette County, CARL F. WOODS, Honorable Circuit Clerk of Lamar County, SEYAINE SEALY, Honorable Circuit Clerk of Marengo County, JACK T. PATE, Honorable Circuit Clerk of Pickens County, JOHNNIE KNOTT, Honorable Circuit Clerk of Greene County, CAROLE SMITH, Honorable Circuit Clerk of Sumter County, BETTY GAYLE PATE, Honorable Circuit Clerk of Hale County, KIM S. BENEFIELD, Honorable Circuit Clerk of Randolph County, FRANK LUCAS, Honorable Circuit Clerk of Tallapoosa County, FRED POSEY, Honorable Circuit Clerk of Autauga County, HORACE D. PERRY, Honorable Circuit Clerk of Cleburne County, ROBERT GIDDENS, Honorable Circuit Clerk of Clay County, PHYLLIS CUMBEE, Honorable Circuit Clerk of Chambers County, EARL SAYERS, Honorable Circuit Clerk of Elmore County, DAN REEVES, Honorable Circuit Clerk of Shelby County, DORIS T. TURNER, Honorable Circuit Clerk of Tuscaloosa County, MIKE SMITH, Honorable Circuit Clerk of Chilton County, GERALD D. PARKER, Honorable Circuit Clerk of Bibb County, BILLY D. HARBIN, Honorable Circuit Clerk of Madison County, JIMMY LINDSEY, Honorable Circuit Clerk of DeKalb County, JEAN ALBERT SCOTT, Honorable Circuit Clerk of Marshall County, CHARLES PAGE, JR., Honorable Circuit Clerk of Limestone County, LEONARD V. GRIGGS, Honorable Circuit Clerk of Jackson County, J.T. NEWTON, Honorable Circuit Clerk of Franklin County, JAMES O. GARRARD, Honorable Circuit Clerk of Marion County, W.F. BAILEY, Honorable Circuit Clerk of Winston County, ROBERT G. BATES, Honor-

able Circuit Clerk of Cullman County, MICHAEL E. CRISWELL, Honorable Circuit Clerk of Blount County, C. PHILLIP BOWLING, Honorable Circuit Clerk of Colbert County, KENNETH C. AUSTIN, Honorable Circuit Clerk of Lauderdale County, W. LARRY SMITH, Honorable Circuit Clerk of Lawrence County, CLEO D. TEAGUE, Honorable Circuit Clerk of Morgan County,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Alabama

(April 26, 1995)

Before TJOFLAT, Chief Judge, EDMONDSON and BIRCH, Circuit Judges.

PER CURIAM:

Following oral argument, we certified the following question to the Supreme Court of Alabama:

> WHETHER ABSENTEE BALLOTS THAT, ON THE ACCOMPANYING AFFIDAVIT ENVELOPE, FAIL TO HAVE TWO WITNESSES AND LACK PROPER NOTARIZATION (FOR EXAMPLE, BALLOT ENVELOPES THAT HAVE ONLY A SIGNATURE OR ONLY ONE WITNESS, OR ON WHICH THE VOTER AND THE NOTARY HAVE SIGNED THE BALLOT BUT THE NOTARY FAILS TO FILL IN THE "TITLE OF OFFICIAL") MEET THE REQUIREMENTS OF ALABAMA LAW, SPECIFICALLY ALABAMA CODE SECTION 17-10-7, TO BE LEGAL BALLOTS DUE TO BE COUNTED IN THE NOVEMBER 8, 1994 GENERAL ELECTION.

Roe v. Alabama, 43 F.3d 574, 583 (11th Cir. 1995). The Supreme Court of Alabama has answered in the affirmative. *Roe v. Mobile County Appointing Bd.*, —— So.2d —— (Ala. 1995) (slip op. 1940461, March 14, 1995).

We remand these proceedings to the district court for a trial on the merits. The court should address, and make findings of fact on, the following issues:

1. The extent to which, if at all, ballots such as the ballots at issue in this case (the "contested absentee ballots")[1] were regularly excluded from the vote count in Alabama counties prior to the November 8 election and, if so, in which counties;

2. The extent to which, if at all, ballots such as the contested absentee ballots were regularly counted in Alabama counties prior to the November 8, 1994 election and, if so, in which counties;

3. In any county in which ballots such as the contested absentee ballots were regularly counted prior to the November 8 election, whether contested absentee ballots were counted in that county on November 8;

4. In any county in which ballots such as the contested absentee ballots were regularly counted prior to the November 8 election, whether a reasonable absentee voter in that county knew or should have known that such ballots were counted;

5. In any county in which ballots such as the contested absentee ballots were counted prior to the November 8 election and in which a reasonable voter in that

[1] "Contested absentee ballots," as we defined them in our previous opinion, are those absentee ballots that were accompanied by an affidavit envelope that was signed by the voter but either: (1) was not properly notarized; or (2) was not properly witnessed by two adult witnesses. *See Roe*, 43 F.3d at 578 n.5.

county knew or should have known that such ballots were counted, the source of information regarding the practice from which a reasonable voter learned or should have learned of the practice;

6. In any county in which ballots such as the contested absentee ballots were regularly counted prior to the November 8 election:

a. The percentage of total votes for statewide office cast by absentee ballot (both contested and other) and the percentage of total votes cast by contested absentee ballot in the November 8 election in that county; and

b. The percentage of total votes for statewide office cast by abcentee ballot (whether the affidavit was complete or not) in the previous two elections for statewide office in that county;

7. Whether state officials such as the Attorney General of Alabama or the Secretary of State of Alabama have taken consistent positions regarding whether ballots such as the contested absentee ballots are to be counted or excluded and, if so, the form in which such positions were communicated to the average voter or county voting official and the time at which such positions were taken;

8. Whether county voting officials charged with running the elections instructed prospective voters that ballots such as the contested absentee balolts might be counted and, if so, the extent of this practice on the part of county voting officials;

9. Whether the 1994 written absentee ballot instructions to voters stated that ballots lacking proper notarization and the signatures of two adult witnesses would not be counted, the precise words used in such written instructions, and whether a reasonable voter could have understood the written instructions to be aspirational rather than mandatory;

10. The number of voters initially certified [2] to the Secretary of the State of Alabama from each of Alabama's sixty-seven counties in favor of Sonny Hornsby, the Democratic candidate for Chief Justice of the Supreme Court of Alabama;

11. The number of votes initially certified to the Secretary of the State of Alabama from each of Alabama's sixty-seven counties in favor of Perry O. Hooper, Sr., the Republican candidate for Chief Justice of the Supreme Court of Alabama;

12. The number of votes initially certified to the Secretary of the State of Alabama from each of Alabama's sixty-seven counties in favor of candidates for Chief Justice other than Sonny Hornsby or Perry O. Hooper, Sr., if any;

13. The number of votes initially certified to the Governor of the State of Alabama from each of Alabama's sixty-seven counties in favor of Lucy Baxley, the Democratic candidate for Treasurer of the State of Alabama;

14. The number of votes initially certified to the Governor of the State of Alabama from each of Alabama's sixty-seven counties in favor of James D. Martin, the Republican candidate for Treasurer of the State of Alabama;

15. The number of votes initially certified to the Governor of the State of Alabama from each of Alabama's

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[2] The "number of votes initially certified" includes those vote totals originally sent to the Secretary of State or the Governor pursuant to sections 17-13-7 and 17-14-22 of the Alabama Election Code *before* the Montgomery County Circuit Court ordered that contested absentee ballots be counted. *See Odom v. Bennett*, No. 94-2434-R (Montgomery County Cir., Ct., filed Nov. 16, 1994); *see generally* Ala. Code §§ 17-13-7, 17-14-22 (1988). In addition, the district court should ascertain the effect of any supplemental certifications that were made for any reason *other than* to comply with the *Odom* court's order.

sixty-seven counties in favor of candidates for Treasurer other than Lucy Baxley or James D. Martin, if any;

16. Whether any of the vote totals initially certified from any county contained any contested absentee ballots and, if so,

a. Whether there exists a previous official vote count from that county, or those counties, that reliably tabulated the votes without including the contested absentee ballots, i.e., a tabulation of voting booth ballots and uncontested absentee ballots;

b. The number of contested absentee ballots contained in the county's, or counties', initial vote total(s), if calculable, and the number of contested absentee ballots contained in the statewide initial vote total, if calculable;

17. If any of the vote totals initially certified from each county contained contested absentee ballots; whether those contested absentee ballots are in any way physically separable from the larger pool of ballots, and, if not, whether there exists any other method, short of obtaining the testimony of each voter who cast a contested absentee ballot, of identifying and counting contested absentee ballots for purposes of determining the effect of the contested absentee ballots on the elections for the offices of Chief Justice and Treasurer.

In addressing these issues, the district court should be cognizant of the purpose of this court's remand: The parties should have a speedy trial to determine the practice in Alabama regarding the counting of contested absentee ballots prior to the November 8 election, to determine the extent to which such practice was known to reasonable absentee voters in Alabama, and to determine what effect, if any, the contested absentee ballots had on the outcome of the elections for Chief Justice and Treasurer. This court is particularly concerned with the possible effect of any contested absentee ballots included

in initial certifications. In setting out issues that we think will require factfinding after trial, we do not limit the authority of the district court to order other issues tried and to find additional facts. We note in passing that the plaintiffs, the Davis class, and the state defendants (including the Secretary of State) may be able to establish certain facts by stipulation.

The district court's preliminary injunction, as modified by our previous order, is affirmed. *See Roe,* 43 F.3d at 583.

IT IS SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 94-7155 and 94-7138

D.C. Docket No. CV 94-885-AH-S

LARRY ROE, PERRY O. HOOPER, SR., JAMES D. MARTIN,
Plaintiffs-Appellees,

versus

STATE OF ALABAMA, By and through its
Attorney General JAMES EVANS,
Defendant-Appellant,

JAMES BENNETT, Honorable Alabama Secretary of State,
Defendant-Appellant,

JOHN W. DAVIS, a representative of a class of persons who have sought to have their ballots counted in an action in the Circuit Court of Coosa County, Alabama,
Defendant-Appellant,

MOBILE COUNTY APPOINTING BOARD,
LIONEL W. NOONAN,
Defendants,

WILCOX COUNTY APPOINTING BOARD,
JERRY BOGGAN,
Defendants-Appellants,

O.P. WOODRUFF, Honorable Probate Judge of Lowndes, County, WILLIE VAUGHNER, Honorable Sheriff of Lowndes County, *et al.*,
Defendants.

ELSIE DAVIS, Honorable Circuit Clerk of Lowndes County, W.A. KYNARD, Honorable Circuit Clerk of Dallas County, MARY C. MOORE, Honorable Circuit Clerk of Perry County, CURTIS J. ELZIE, Honorable Circuit Clerk of Bullock County, DAVID S. NIX, Honorable Circuit Clerk of Barbour County, DEVON KIKER, Honorable Circuit Clerk of Russell County, EDDIE D. MALLARD, Honorable Circuit Clerk of Macon County, DEBRA P. HACKETT, Honorable Circuit Clerk of Montgomery County, BARBARA CRAFT, Honorable Circuit Clerk of Calhoun County, POLLY CONRADI, Honorable Circuit Clerk of Jefferson County, BILLY S. YATES, Honorable Circuit Clerk of Etowah County, EARL CARTER, Honorable Circuit Clerk of Jefferson County, Bessemer Division, CAROLYN M. SMITH, Honorable Circuit Clerk of Cherokee County, JEAN BROWNING, Honorable Circuit Clerk of St. Clair County, SAMUEL L. GRICE, Honorable Circuit Clerk of Talladega County, JACKIE CALHOUN, Honorable Circuit Clerk of Baldwin County, JACKIE B. HOWARD, Honorable Circuit Clerk of Washington County, SUSAN F. WILSON, Honorable Circuit Clerk of Mobile County, DONALD R. GIBSON, Honorable Circuit Clerk of Choctaw County, WAYNE BRUNSON, Honorable Circuit Clerk of Clarke County, JOHN SAWYER, Honorable Circuit Clerk of Monroe County, JAMES D. TAYLOR, Honorable Circuit Clerk of Escambia County, BRENDA M. PEACOCK, Honorable Circuit Clerk of Pike County, ANN W. TATE, Honorable Circuit Clerk of Crenshaw County, BOBBY T. BRANUM, Honorable Circuit Clerk of Butler County, JEAN E. RILEY, Honorable Circuit Clerk of Conecuh County, JULIA L. TRANT, Honorable Circuit Clerk of Houston County, JIM ELLIS, Honorable Circuit Clerk of Coffee County, ROGER A. POWELL, Honorable Circuit Clerk of Covington County, CONNIE BURDESHAW, Honorable Circuit Clerk of Henry County, WILLIE POWELL, Honorable Circuit Clerk of Wilcox County, VELERIA THOMLEY, Honorable Circuit Clerk of Geneva County, BETTYE B. GARRETT, Honorable

Circuit Clerk of Dale County, VINITA B. THOMPSON, Honorable Circuit Clerk of Walker County, JAMES E. RENFROE, Honorable Circuit Clerk of Fayette County, CARL F. WOODS, Honorable Circuit Clerk of Lamar County, SEYAINE SEALY, Honorable Circuit Clerk of Marengo County, JACK T. PATE, Honorable Circuit Clerk of Pickens County, JOHNNIE KNOTT, Honorable Circuit Clerk of Greene County, CAROLE SMITH, Honorable Circuit Clerk of Sumter County, BETTY GAYLE PATE, Honorable Circuit Clerk of Hale County, KIM S. BENEFIELD, Honorable Circuit Clerk of Randolph County, FRANK LUCAS, Honorable Circuit Clerk of Tallapoosa County, FRED POSEY, Honorable Circuit Clerk of Autauga County, HORACE D. PERRY, Honorable Circuit Clerk of Cleburne County, ROBERT GIDDENS, Honorable Circuit Clerk of Clay County, PHYLLIS CUMBEE, Honorable Circuit Clerk of Chambers County, EARL SAYERS, Honorable Circuit Clerk of Elmore County, DAN REEVES, Honorable Circuit Clerk of Shelby County, DORIS T. TURNER, Honorable Circuit Clerk of Tuscaloosa County, MIKE SMITH, Honorable Honorable Circuit Clerk of Coosa County, R.L. FOSTER, Honorable Circuit Clerk of Bibb County, BILLY D. HARBIN, Honorable Circuit Clerk of Madison County, JIMMY LINDSEY, Honorable Circuit Clerk of DeKalb County, JEAN ALBERT SCOTT, Honorable Circuit Clerk of Marshall County, CHARLES PAGE, JR., Honorable Circuit Clerk of Limestone County, LEONARD V. GRIGGS, Honorable Circuit Clerk of Jackson County, J.T. NEWTON, Honorable Circuit Clerk of Franklin County, JAMES O. GARRARD, Honorable Circuit Clerk of Marion County, W.F. BAILEY, Honorable Circuit Clerk of Winston County, ROBERT G. BATES, Honorable Circuit Clerk of Cullman County, MICHAEL E. CRISWELL, Honorable Circuit Clerk of Blount County, C. PHILLIP BOWLING, Honorable Circuit Clerk of Colbert County, KENNETH C. AUSTIN, Honorable Circuit Clerk of Lauderdale County, W. LARRY SMITH, Hon-

orable Circuit Clerk of Lawrence County, CLEO D. TEAGUE, Honorable Circuit Clerk of Morgan County,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Alabama

Before TJOFLAT, Chief Judge, EDMONDSON and BIRCH, Circuit Judges.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and were taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court in these causes be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED THAT defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 26, 1995
For the Court:

MIGUEL J. CORTEZ
Clerk

By: /s/ Matt Davidson
Deputy Clerk

Issued as Mandate: April 26, 1995

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 94-7155 and 94-7138

D.C. Docket No. CV 94-885-AH-S

LARRY ROE, PERRY O. HOOPER, SR., JAMES D. MARTIN,
Plaintiffs-Appellees,

versus

STATE OF ALABAMA, By and through its
Attorney General JAMES EVANS,
Defendant-Appellant,

JAMES BENNETT, Honorable Alabama Secretary of State,
Defendant-Appellant,

JOHN W. DAVIS, a representative of a class of persons who have sought to have their ballots counted in an action in the Circuit Court of Coosa County, Alabama,
Defendant-Appellant,

MOBILE COUNTY APPOINTING BOARD,
LIONEL W. NOONAN,
Defendants,

WILCOX COUNTY APPOINTING BOARD,
JERRY BOGGAN,
Defendants-Appellants,

O.P. WOODRUFF, Honorable Probate Judge of Lowndes, County, WILLIE VAUGHNER, Honorable Sheriff of Lowndes County, *et al.*,

Defendants.

ELSIE DAVIS, Honorable Circuit Clerk of Lownes County, W.A. KYNARD, Honorable Circuit Clerk of Dallas County, MARY C. MOORE, Honorable Circuit Clerk of Perry County, CURTIS J. ELZIE, Honorable Circuit Clerk of Bullock County, DAVID S. NIX, Honorable Circuit Clerk of Barbour County, DEVON KIKER, Honorable Circuit Clerk of Russell County, EDDIE D. MALLARD, Honorable Circuit Clerk of Macon County, DEBRA P. HACKETT, Honorable Circuit Clerk of Montgomery County, BARBARA CRAFT, Honorable Circuit Clerk of Calhoun County, POLLY CONRADI, Honorable Circuit Clerk of Jefferson County, BILLY S. YATES, Honorable Circuit Clerk of Etowah County, EARL CARTER, Honorable Circuit Clerk of Jefferson County, Bessemer Division, CAROLYN M. SMITH, Honorable Circuit Clerk of Cherokee County, JEAN BROWNING, Honorable Circuit Clerk of St. Clair County, SAMUEL L. GRICE, Honorable Circuit Clerk of Talladega County, JACKIE CALHOUN, Honorable Circuit Clerk of Baldwin County, JACKIE B. HOWARD, Honorable Circuit Clerk of Washington County, SUSAN F. WILSON, Honorable Circuit Clerk of Mobile County, DONALD R. GIBSON, Honorable Circuit Clerk of Choctaw County, WAYNE BRUNSON, Honorable Circuit Clerk of Clarke County, JOHN SAWYER, Honorable Circuit Clerk of Monroe County, JAMES D. TAYLOR, Honorable Circuit Clerk of Escambia County, BRENDA M. PEACOCK, Honorable Circuit Clerk of Pike County, ANN W. TATE, Honorable Circuit Clerk of Crenshaw County, BOBBY T. BRANUM, Honorable Circuit Clerk of Butler County, JEAN E. RILEY, Honorable Circuit Clerk of Conecuh County, JULIA L. TRANT, Honorable Circuit Clerk of Houston County, JIM ELLIS, Honorable Circuit Clerk of Coffee County, ROGER A. POWELL,

Honorable Circuit Clerk of Covington County, CONNIE BURDESHAW, Honorable Circuit Clerk of Henry County, WILLIE POWELL, Honorable Circuit Clerk of Wilcox County, VELERIA THOMLEY, Honorable Circuit Clerk of Geneva County, BETTYE B. GARRETT, Honorable Circuit Clerk of Dale County, VINITA B. THOMPSON, Honorable Circuit Clerk of Walker County, JAMES E. RENFROE, Honorable Circuit Clerk of Fayette County, CARL F. WOODS, Honorable Circuit Clerk of Lamar County, SEYAINE SEALY, Honorable Circuit Clerk of Marengo County, JACK T. PATE, Honorable Circuit Clerk of Pickens County, JOHNNIE KNOTT, Honorable Circuit Clerk of Greene County, CAROLE SMITH, Honorable Circuit Clerk of Sumter County, BETTY GAYLE PATE, Honorable Circuit Clerk of Hale County, KIM S. BENEFIELD, Honorable Circuit Clerk of Randolph County, FRANK LUCAS, Honorable Circuit Clerk of Tallapoosa County, FRED POSEY, Honorable Circuit Clerk of Autauga County, HORACE D. PERRY, Honorable Circuit Clerk of Cleburne County, ROBERT GIDDENS, Honorable Circuit Clerk of Clay County, PHYLLIS CUMBEE, Honorable Circuit Clerk of Chambers County, EARL SAYERS, Honorable Circuit Clerk of Elmore County, DAN REEVES, Honorable Circuit Clerk of Shelby County, DORIS T. TURNER, Honorable Circuit Clerk of Tuscaloosa County, MIKE SMITH, Honorable Circuit Clerk of Chilton County, GERALD D. PARKER, Honorable Circuit Clerk of Coosa County, R.L. FOSTER, Honorable Circuit Clerk of Bibb County, BILLY D. HARBIN, Honorable Circuit Clerk of Madison County, JIMMY LINDSEY, Honorable Circuit Clerk of DeKalb County, JEAN ALBERT SCOTT, Honorable Circuit Clerk of Marshall County, CHARLES PAGE, JR., Honorable Circuit Clerk of Limestone County, LEONARD V. GRIGGS, Honorable Circuit Clerk of Jackson County, J.T. NEWTON, Honorable Circuit Clerk of Franklin County, JAMES O. GARRARD, Honorable Circuit Clerk of Marion County, W.F. BAILEY, Honorable Circuit Clerk of Winston County, ROBERT G. BATES, Honor-

able Circuit Clerk of Cullman County, MICHAEL E. CRISWELL, Honorable Circuit Clerk of Blount County, C. PHILLIP BOWLING, Honorable Circuit Clerk of Colbert County, KENNETH C. AUSTIN, Honorable Circuit Clerk of Lauderdale County, W. LARRY SMITH, Honorable Circuit Clerk of Lawrence County, CLEO D. TEAGUE, Honorable Circuit Clerk of Morgan County,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Alabama

Jan. 4, 1995

Rehearing and Suggestion for Rehearing
En Banc Denied Feb. 23, 1995

Before TJOFLAT, Chief Judge, EDMONDSON and BIRCH, Circuit Judges.

PER CURIAM:

In Alabama, a person voting by absentee ballot must execute an "affidavit" in the presence of a " 'notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older.' " Ala.Code § 17-10-7 (1980).[1] Section 17-10-9 of the code prescribes the physical form of the ballot and the affidavit. The affidavit form must be printed on an envelope. A second, smaller envelope, which does not identify the absentee voter and contains the voter's completed ballot, must be sealed in-

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[1] The contents of this affidavit are prescribed by § 17-10-7 of the Alabama Code, the full text of which appears in the appendix to this opinion.

side the affidavit envelope, and that envelope must then be mailed to the appropriate county election official. *See* Ala.Code § 17-10-9 (1980).

The affidavit envelopes are held unopened until noon on election day. Beginning at noon, the "absentee election manager" delivers the envelopes to the "election officials" for counting. They, in turn, with poll watchers present, call the name of each voter casting an absentee ballot, "open each affidavit envelope, review the affidavit to certify that such voter is entitled to vote and deposit the plain envelope containing the absentee ballot into a sealed ballot box." Ala.Code § 17-10-10 (1980). These ballots are then "counted and otherwise handled in all respects as if the said absentee voter were present and voting in person." *Id.*[2]

Alabama law also provides a method of contesting statewide elections such as those involved in this case. Section 17-15-50 of the Alabama Code provides that any

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[2] The Secretary of State's Election Handbook for 1994 interpreted these requirements as follows:

> The task of absentee poll workers on election day falls into two phases. Beginning at noon (or later) they are to open the affidavit envelopes, review the affidavits, and deposit the plain envelopes in a sealed ballot box.
>
> If, upon examination, the affidavit *is not properly witnessed or notarized,* is not signed by the voter, or does not otherwise contain sufficient information to determine that the person is a qualified elector and is entitled to vote absentee, the ballot should not be counted [Attorney General's opinion 80-00551]. Otherwise, the ballot should be deposited into a sealed ballot box.

Alabama Election Handbook 257 (6th ed. 1994) (citation in original) (emphasis added). The Attorney General's Opinion cited in the election handbook states:

> If, upon examination, the affidavit obviously does not comply with Alabama law, that is, if it is not properly witnessed or notarized, is not signed by the voter, or does not otherwise contain sufficient information to determine that the person

elector may contest certain statewide elections by filing a written statement and a bond with the state legislature within ten days after the Speaker of the House of Representatives has opened the election returns. Ala.Code § 17-15-50 (1940).[3] The legislature is then required to elect a commission of three senators and five representatives to take testimony submitted in the contest. *Id.* § 17-15-53. The commission is provided with subpoena and contempt powers. *Id.* §§ 17-15-55, 17-15-57. "[T]he final judgment of the joint convention [of the House and Senate] upon the contest shall [be] effective as a judgment and shall have the force and effect of vesting the title to the office . . . in the person in whose favor the judgment may be rendered." *Id.* § 17-15-52.[4] Thus, the legislature is the final arbiter of statewide office contests.

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is a qualified elector and is entitled to vote absentee, the ballot should not be counted.

80 Op. Att'y Gen. 551 (1980). The Secretary of State, James Bennett, testified in the proceedings below that it was "his understanding that ballots that are not witnessed by two people over the age of 18 or notarized [were] not counted prior to the Montgomery County [Circuit] Court case." *Odom v. Bennett*, No. 94-2434-R (Montgomery County Cir.Ct. filed Nov. 16, 1994).

[3] The statewide officers for which elections are contestable in the state legislature are Governor, Secretary of State, Auditor, Treasurer, Attorney General, Commissioner of Agriculture and Industries, Justices of the Supreme Court, and Judges of the Court of Appeals. Ala.Code § 17-15-50.

[4] The Alabama legislature has ensured that the decision of the joint convention of the House and Senate shall be conclusive by providing that no judge or court shall have jurisdiction to decide election contests involving the specified state-wide offices. Section 17-15-6 provides:

> No jurisdiction exists in or shall be exercised by any judge, court or officer exercising chancery powers to entertain any proceeding for ascertaining the legality, conduct or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute; and any injunction, process or order from any judge, court or officer in the exercise of chancery powers, whereby the results of any election are sought to be inquired into, ques-

On November 8, 1994, Alabama held a general election for several statewide offices, including the offices of Chief Justice of the Supreme Court of Alabama and Treasurer of the State of Alabama. Between 1000 and 2000 absentee voters failed to properly complete their affidavits, either by failing to have their signatures notarized or by failing to have them witnessed by two people. Pursuant to the statutory mandate of section 17-10-10, and the statewide practice prior to the general election, these ballots were not counted: they were not removed from their affidavit envelopes and, therefore, were not placed in the ballot box.[5]

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tioned or affected . . . save as may be specially and specifically enumerated and set down by statute, shall be null and void and shall not be enforced by any officer or obeyed by any officer or obeyed by any person. . . .

Ala.Code § 17-15-6. This provision is especially significant in light of the common law of Alabama:

> [E]lection contests exist only by virtue of statutory enactment and such statutes are to be strictly construed. [*Groom v. Taylor*, 235 Ala. 247, 178 So. 33 (1938)]. "The right to contest an election is not a common-law right (*Cosby v. Moore*, 259 Ala. 41, 65 So.2d 178 [(1953)]). Elections belong to the political branch of the govenrment, and, in absence of special constitutional or statutory provisions, are beyond the control of judicial power." 29 C.J.S. Elections § 246. Further at § 247 the rule is stated that statutes providing for election contests "should be strictly construed or observed as to those provisions for inaugurating the contest and which are necessary to jurisdiction [citing *Walker v. Junior*, 247 Ala. 342, 24 So.2d 431 (1945); *Groom*, 235 Ala. 247, 178 So. 33]. . . . An election contest being purely statutory, the courts are limtied in their investigation to such subjects as are specified in the statutes. The remedy is not to be extended to include cases not within the language of the statute; and the right of contest is not to be inferred from doubtful provisions."

Longshore v. City of Homewood, 277 Ala. 444, 171 So.2d 453, 455 (1965).

[5] We refer to any ballot that was accompanied by an unnotarized or unwitnessed affidavit—whether or not the ballot has been removed from its affidavit envelope—as a "contested absentee ballot."

The elections for Chief Justice and Treasurer, especially the former office, were quite close. Informal estimates place the two candidates for Chief Justice a mere 200 to 300 votes apart without counting the contested absentee ballots. Following the general election, two individuals who voted absentee, on behalf of themselves and similarly situated absentee voters, filed a complaint in the Circuit Court for Montgomery County, Alabama, seeking an order that the contested absentee ballots be counted. *Odom v. Bennett*, No. 94-2434-R (Montgomery County Cir.Ct., filed Nov. 16, 1994). On November 17, 1994, the circuit court entered a "Temporary Restraining Order" requiring that "those persons counting the abstentee ballots for each county shall count each ballot which contains: (1) the place of residence of the person casting the ballot; (2) the reason for . . . voting by absentee ballot; and (3) the signature of the voter. *Absentee ballots may not be excluded from being counted because of a lack of notarization or a lack of witnesses.*" (Emphasis added). The circuit court also ordered the Secretary of State to refrain from certifying the election until the vote totals, including the contested absentee votes, are forwarded to him; after receiving these revised totals, the Secretary must certify the election.[6] Following the entry

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[6] On December 9, 1994, the circuit court entered a preliminary injunction incorporating its "Temporary Restraining Order" and further elaborating on the reasons for the court's conclusion that the contested absentee ballots were required to be counted under Alabama law. The circuit court felt that *Wells v. Ellis*, 551 So.2d 382, 383 (Ala.1989), and *Williams v. Lide*, 628 So.2d 531, 536 (Ala.1993), required that the contested absentee ballots be counted because the affidavit envelopes accompanying them were in "substantial compliance" with § 17-10-7. The circuit court determined that it had the authority to enter the injunction despite the jurisdictional bar of § 17-15-6, quoted *supra* note 4, because the circuit court was exercising its power for the "limited purpose of ordering public officials to comply with legal principles." *Odom v. Bennett* (citing *Sears v. Carson*, 551 So.2d 1054, 1056 (Ala.1989)).

of this temporary restraining order, the election officials began counting the contested absentee ballots.[7]

On December 5, 1994, the United States District Court for the Southern District of Alabama, in a suit brought under 42 U.S.C. § 1983 (1988)[8] by Larry Roe, a voter suing on behalf of himself and others similarly situated, Perry O. Hooper, Sr., the Republican candidate for Chief Justice, and James D. Martin, the Republican candidate for Treasurer, entered a preliminary injunction against the Secretary and the election officials of Alabama's sixty-seven counties precluding them from complying with the circuit court's order.[9] The district court, in its memorandum order granting the preliminary injunction, found from the evidence the parties presented that "the past practice of the Alabama election officials prior to [the] general election has been to refrain from counting any absentee

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[7] The parties indicated at oral argument before this panel on December 29 that 30 counties have removed the contested absentee ballots from their corresponding affidavit envelopes, placed the ballots in the ballot pool, recounted the votes, and forwarded the revised results to the Secretary. In the remaining 37 counties, the contested absentee ballots are in various conditions: some remain in their unopened affidavit envelopes; some have been removed from their affidavit envelopes but remain unopened and uncounted; and some have been removed from their affidavit envelopes, opened and counted. As to the ballots in the latter two groups, each ballot envelope, or ballot, has been placed with the affidavit envelope that contained it.

[8] "Section 1983 is the federal statute under which a citizen may bring suit in a federal court, alleging that persons acting under color of state law have deprived him or her of rights secured by the Constitution of the United States." *Curry v. Baker*, 802 F.2d 1302, 1305 (11th Cir.), *cert. denied*, 479 U.S. 1023, 107 S.Ct. 1262, 93 L.Ed.2d 819 (1986). The plaintiffs also sought relief under 42 U.S.C. § 1974 (1988) and the Voting Rights Act, 42 U.S.C. § 1973 (1988). The plaintiffs' claims for relief under those statutes are not at issue in this appeal.

[9] John Davis is also involved in the case as a defendant, representing a group of absentee voters who seek to have their contested absentee ballots counted.

ballot that did not include notarization or the signatures of two qualified witnesses," that "the past practice of the Secretary of [the] State of Alabama has been to certify Alabama election results on the basis of vote counts that included absentee votes cast only by those voters who included affidavits with either notarization or the signatures of two qualified witnesses," and that the Montgomery County Circuit Court's order changed this past practice. The district court then concluded that, in obeying the circuit court's order, the defendant election officials were violating the Fourteenth Amendment. The district court, therefore, ordered that the contested ballots and other election materials be preserved and protected; that the Secretary refrain from certifying any election results based on a vote count that included the contested absentee ballots; that Alabama's sixty-seven county election officials forward vote totals to the Secretary without counting the contested absentee ballots; and that the Secretary, upon receipt of those vote totals from the county election officials, certify the election results.

The defendants appeal,[10] raising several issues. They contend that: (1) the district court lacked subject matter jurisdiction to entertain the plaintiffs' case; (2) the plaintiffs failed to state a claim for relief under the United States Constitution; and (3) assuming that the district court had subject matter jurisdiction and that the plaintiffs stated a constitutional claim, the district court should have abstained from exercising its jurisdiction. We address each issue in turn.

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[10] If the district court's order is treated as a preliminary injunction, we have jurisdiction to review the order under 28 U.S.C. § 1292(a)(1) (1988). If the order is treated as a permanent injunction, our jurisdiction lies under 28 U.S.C. § 1291 (1988). Arguably, the district court's order is a permanent injunction. The district court found the material facts, which are not in dispute, on the liability issues, and a further evidentiary hearing regarding those facts appears to be unnecessary; the district court was presented with pure questions of law regarding the liability issues.

I.

Appellants claim that the district court did not have subject matter jurisdiction under the *Rooker-Feldman* doctrine. According to the *Rooker-Feldman* doctrine, "a United States District Court has no authority to review final judgments of a state court in judicial proceedings." *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482, 103 S.Ct. 1303, 1315, 75 L.Ed.2d 206 (1983). Appellants contend that the district court lacked subject matter jurisdiction to entertain the plaintiffs' claims because those claims, in effect, require the district court to review the final judgment of the Montgomery County Circuit Court. We reject this argument for two reasons. First, the plaintiffs in this case are not, by the admission of all parties, parties to the circuit court action. The *Rooker-Feldman* doctrine does not apply to such circumstances. *See Johnson v. De Grandy,* —— U.S. ——, ——, 114 S.Ct. 2647, 2654, 129 L.Ed.2d 775 (1994). Second, because the plaintiffs are not parties to the circuit court action, the plaintiffs had no opportunity to raise their constitutional claims in the circuit court and their claims, therefore, were not considered by the circuit court. *See Wood v. Orange County,* 715 F.2d 1543, 1547 (11th Cir.1983) ("[T]he *Rooker* bar can only apply to issues that the plaintiff had a reasonable opportunity to raise."), *cert. denied,* 467 U.S. 1210, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984).[11]

II.

Appellants contend that the plaintiffs failed to allege, or to demonstrate, the violation of a right "secured by the Constitution" as required under section 1983. *Baker*

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[11] In its December 9, 1994, memorandum order, *see supra* note 6. the Montgomery County Circuit Court identified the issues before it as: "(1) whether the Court had jurisdiction to entertain the proceeding and (2) whether the ballots in question were legally cast and due to be counted." *Odom v. Bennett.*

v. McCollan, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979) (quoting 42 U.S.C. § 1983). We disagree. In this case, Roe, Harper, and Martin allege that "[t]he actions of the Defendants and the Defendant Class . . . would constitute a retroactive validation of a potentially controlling number of votes in the elections for Chief Justice and Treasurer" that "would result in fundamental unfairness and would violate plaintiffs' right of due process of law" in violation of the Fourteenth Amendment, and that this violation of "the plaintiffs' rights to vote and . . . have their votes properly and honestly counted" constituted a violation of the First and Fourteenth Amendments.

The right of sufferage is "a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220 (1886). "[T]he right of sufferage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholy prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S.Ct. 1362, 1377, 12 L.Ed.2d 506 (1964). Not every state election dispute, however, implicates the Due Process Clause of the Fourteenth Amendment and thus leads to possible federal court intervention. Generally, federal courts do not involve themselves in " 'garden variety' election disputes." *Curry*, 802 F.2d at 1315 (quoting *Welch v. McKenzie*, 765 F.2d 1311, 1317, *vacated on other grounds and remanded*, 777 F.2d 191 (5th Cir. 1985)). If, however, "the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots." *Id.* (quoting *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. Unit B 1981), *cert. denied*, 459 U.S. 1012, 103 S.Ct. 368, 74 L.Ed.2d 504 (1982)). We address, then, whether the plaintiffs

have demonstrated fundamental unfairness in the November 8 election. We conclude that they have.

The plaintiffs acknowledge that the State of Alabama is free to place reasonable time, place, and manner restrictions on voting, and that Alabama can require that voters be qualified electors. *See generally Burdick v. Takushi*, —— U.S. ——, ——, 112 S.Ct. 2059, 2063, 119 L.Ed.2d 245 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections. . . ."). They argue, however, that section 17-10-7 of the Alabama Election Code clearly requires that affidavits accompanying absentee ballots be either notarized or signed by two witnesses: that the statewide practice in Alabama prior to the November 8 general election was to exclude absentee ballots that did not comply with this rule; and that the circuit court's order requiring the state's election officials to perform the ministerial act of counting the contested absentee ballots,[12] if permitted to stand, will constitute a retroactive change in the election laws that will effectively "stuff the ballot box," [13] implicating fundamental fairness issues. *Cf. United tSates v. Saylor*, 322 U.S. 385, 389, 64 S.Ct. 1101, 1103, 88 L.Ed. 1341 (1944).

We agree that failing to exclude the contested absentee ballots will constitute a post-election departure from previous practice in Alabama. *See Griffin v. Burns*, 570 F.2d 1065, 1075 (1st Cir.1978). This departure

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[12] The counting of ballots is a "ministerial act" under Alabama law. *Cosby v. Moore*, 259 Ala. 41, 65 So.2d 178, 181 (1953).

[13] According to the record before the district court, in one Alabama county, Greene County, nearly 33% of the votes cast were from absentee voters. Secretary Bennett testified that he has "had concerns about absentee voter fraud for years" and that, if absentee ballots exceed 6% to 7% of the total votes cast, "bells and sirens ought to go off. There cannot be that many sick, infirm or out-of-county voters on one day." *Odom v. Bennett.*

would have two effects that implicate fundamental fairness and the propriety of the two elections at issue. First, counting ballots that were not previously counted would dilute the votes of those voters who met the requirements of section 17-10-7 as well as those voters who actually went to the polls on election day. Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the notarization/witness requirement. *See, e.g., Brown v. O'Brien*, 469 F.2d 563, 569 (D.C.Cir.), *vacated as moot*, 409 U.S. 816, 93 S.Ct. 67, 34 L.Ed.2d 72 (1972) ("If the party had adopted [the rule change] prior to the . . . primary election, the candidates might have campaigned in a different manner. . . . Voters might have cast their ballots for a different candidate; and the State of California might have enacted an alternative delegate selection scheme. . . ." (footnote omitted)).

Appellants point out that "[a] judicial construction of a statute is an authoritative statement of what the statute mean before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, —— U.S. ——, ——, 114 S.Ct. 1510, 1519, 128 L.Ed.2d 274 (1994). Thus, appellants urge, the Montgomery County Circuit Court's ruling merely articulated in a clearer way what the law has always been in Alabama. This argument, however, ignores the fact that section 17-10-7, on its face, requires notarization or witnessing, that the Secretary and the Attorney General have acknowledged the requirement and that, as the district court found, the practice of the election officials throughout the state has been to exclude absentee ballots that did not meet this requirement. We consider it unreasonable to expect average voters and candidates to question the Secretary's, the Attorney General's, and the election officials' interpretation and application of the statute, especially in light of its plain language. *See Griffin*, 570 F.2d at 1076.

Appellants also argue that this case presents a case of enfranchisement of those who cast the contested absentee ballots, rather than a disenfranchisement of qualified voters, and thus does not rise to the level of a constitutional violation. They rely heavily on *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir.1980), *cert. denied*, 451 U.S. 985, 101 S.Ct. 2318, 68 L.Ed.2d 842 (1981). In that case, the plaintiffs challenged the tallying of ballots in a local election in Puerto Rico. A section of the Electoral Law of Puerto Rico provided that, if a handwritten ballot was used in an election, the Electoral Commission had to guarantee that the elector was qualified to vote by making a mark in a specific place on the ballot.[14] The section stated that if the mark was not made in the correct space, the ballot would be null and void. After the election, the Administrator of the Election Commission and the Commonwealth's Electoral Review Board held that several ballots were invalid because they were not marked correctly. The Supreme Court of Puerto Rico reversed, holding that, despite the section's clear language, the ballots should be counted. The *Barreto Perez* plaintiffs, citing *Griffin*, alleged that the Puerto Rico Supreme Court's ruling constituted a change in the method of counting ballots after the election and, therefore, violated the Constitution. *Id.* at 826.

The First Circuit did not agree for two reasons. First, the court found it significant that "this case does not involve a state court order that *dis*enfranchises voters; rather it involves a . . . decision that *en*franchises them —plaintiffs claim that votes were 'diluted' by the votes of others, not that they themselves were prevented from voting." *Id.* at 828 (emphasis in original). Second, the court found that "no party or person is likely to have acted to their detriment by relying upon the invalidity of

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[14] It is not clear whether the Electoral Commission itself, or a representative of the Commission at the polling place, was required to mark the ballots.

[the contested] ballots. . . ." *Id.* Accordingly, the First Circuit found no constitutional injury. We need not address the court's apparent holding that dilution is not a constitutional injury because the facts of this case differ markedly from those of *Barreto Perez*. We believe that, had the candidates and citizens of Alabama known that something less than the signature of two witnesses or a notary attesting to the signature of absentee voters would suffice, campaign strategies would have taken this into account and supporters of Hooper and Martin who did not vote would have voted absentee.[15]

III.

The appellants contend that, since this case involves "a sensitive area of state policy," the district court should have stayed its hand and required the plaintiffs to invoke their state remedies—either an election contest in the legislature or a judicial declaration from the Supreme Court of Alabama. *See Railroad Comm'n v. Pullman*, 312 U.S. 496, 501-02, 61 S.Ct. 643, 645-46, 85 L.Ed. 971 (1941).[16] We agree that federal courts should refrain from holding a state election law unconstitutional when a reasonable alternative course of action exists. *See Burdick v. Takushi*, 846 F.2d 587, 589 (9th Cir.1988). We are, therefore, reluctant to reach a final decision in this case while the proper application of the Alabama Election Code remained muddled.

There are two ways to show deference to the state decisionmakers in this matter: we can leave the plain-

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[15] We take judicial notice of the fact that reducing the inconvenience of voting absentee—by eliminating the necessity of obtaining the signature of a notary or two witnesses—would increase the number of absentee ballots.

[16] The defendants contend that the plaintiffs could obtain a judicial declaration from the Supreme Court of Alabama by seeking and obtaining intervention in *Odom v. Bennett*, the Montgomery County Circuit Court case, and then, if they do not prevail, appealing.

tiffs to their state remedies: or we can certify a question to the Supreme Court of Alabama, retain jurisdiction, and await that court's answer. We choose the latter form of abstention; leaving the plaintiffs to their state remedies is neither workable nor appropriate in this case.

Because Alabama has barred its courts from entertaining statewide election contests, *see* Ala.Code § 17-15-6 (quoted *supra* note 4), there is only one state remedy in this case: a contest in the legislature. The legislature, however, is not an adequate or proper forum for the resolution of the federal constitutional issues presented. Moreover, even if the plaintiffs were to intervene successfully in the Montgomery County Circuit Court proceeding, *Odom v. Bennett*, and the Alabama appellate courts [17] were to find—despite the clear jurisdictional bar—that the circuit court had the power to hear the plaintiffs' constitutional claims, the urgency of this matter counsels against such a course of action. The unnecessary delay that would result were we to leave the plaintiffs to their state court remedy would be particularly insidious: it would extend the time that the two offices at issue remain in limbo, hindering those offices in the handling of state affairs. Time is, therefore, of the essence. *Cf. Harman v. Forssenius*, 380 U.S. 528, 537, 85 S.Ct. 1177, 1183, 14 L.Ed.2d 50 (1965) (holding that a district court did not abuse its discretion in refusing to abstain "[g]iven the importance and immediacy of the problem[] and the delay inherent in referring questions of state law to state tribunals"); *Badham v. United States Dist. Court*, 721 F.2d 1170, 1173 (9th Cir.1983) ("Although we are mindful of the important principles of federalism implicit in the doctrine of absention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote.").

By certifying the question to the Supreme Court of Alabama, we can accommodate Alabama's interest in hav-

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[17] The Alabama Court of Appeals and the Supreme Court.

ing its high court settle the question whether a notarization or the signatures of two witnesses is required before an absentee ballot may be counted. Certification will achieve the proper balance between the interest of federalism and timely resolution of this matter. We therefore issue the following certification:

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF ALABAMA PURSUANT TO RULE 18 OF THE ALABAMA RULES OF APPELLATE PROCEDURE.

TO THE SUPREME COURT OF ALABAMA AND ITS HONORABLE JUSTICES:

It appears to the United States Court of Appeals for the Eleventh Circuit that this case involves a question of Alabama state law that is determinative of the cause, but unanswered by controlling precedent of the Supreme Court of Alabama or any Alabama Court of Appeals. We therefore certify this question for resolution by the highest court of Alabama:

> WHETHER ABSENTEE BALLOTS THAT, ON THE ACCOMPANYING AFFIDAVIT ENVELOPE, FAIL TO HAVE TWO WITNESSES AND LACK PROPER NOTARIZATION (FOR EXAMPLE, BALLOT ENVELOPES THAT HAVE ONLY A SIGNATURE OR ONLY ONE WITNESS, OR ON WHICH THE VOTER AND THE NOTARY HAVE SIGNED THE BALLOT BUT THE NOTARY FAILS TO FILL IN THE "TITLE OF OFFICIAL") MEET THE REQUIREMENTS OF ALABAMA LAW, SPECIFICALLY ALABAMA CODE SECTION 17-10-7, TO BE LEGAL BALLOTS DUE TO BE COUNTED IN THE NOVEMBER 8, 1994 GENERAL ELECTION.

While we await the Supreme Court's answer, to preserve the status quo with respect to the two elections at

issue and, at the same time, allow the processing of the uncontested elections to proceed, we modify and clarify the district court's injunction as follows: (1) We affirm the portion of the district court's injunction requiring the defendants to preserve all election materials. We clarify this portion of the injunction by stressing that contested absentee ballots are not to be opened, altered, or tampered with in any manner. (2) We affirm the portion of the district court's injunction enjoining the Secretary of the State of Alabama from certifying any election results in the general election of November 8, 1994 that have not been purged of known or identifiable contested absentee ballots. Once the election results have been purged of any contested absentee ballots, the Secretary may certify the results of elections for offices that are not contested in this case, to wit: all the elections except those for Chief Justice and Treasurer. (3) With respect to those two offices, we vacate the provisions of the district court's injunction requiring that county election officials forward purged election results to the Secretary and requiring the Secretary to certify the elections based on those forwarded results. We order the Secretary not to certify the elections for the offices of Chief Justice and Treasurer.

QUESTION CERTIFIED: INJUNCTION AFFIRMED AS MODIFIED AND CLARIFIED pending further order of this court.

APPENDIX

§ 17-10-7. Form of affidavit to be printed on envelope—General, special or municipal elections.

Each absentee ballot shall be accompanied by an envelope upon which shall be printed an affidavit. This affidavit which shall be used in general, special or municipal elections shall be substantially as follows:

"State of Alabama

"County of _____

"I, the undersigned, do swear (or affirm) that:

"(1) I am a resident of _____ county in the state of Alabama.

"(2) My place of residence in Alabama is:

_____

(street)

_____, Alabama _____

(city or town) (zip code)

"(3) My voting precinct (or place where I vote) is: _____

_____

"(4) My date of birth is: _____

month day year

"(5) I am entitled to vote an absentee ballot because:

"Check only one:

_____ I have moved from Alabama less than thirty days prior to the election.

———— I will be out of the country or the state on election day.

———— I am physically incapacitated and will not be able to vote in person on election day.

"I further swear (or affirm) that I have not voted nor will I vote in person in the election to which this ballot pertains.

"I have marked the enclosed absentee ballot voluntarily and that I have read or had read to me and understand the instructions accompanying this ballot and that I have carefully complied with such instructions.

"Moreover, I further swear (or affirm), that all of the information given above is true and correct to the best of my knowledge and that I understand that by knowingly giving false information so as to vote illegally by absentee ballot that I shall be guilty of a misdemeanor which is punishable by a fine not to exceed $1,000.00 and/or confinement in the county jail for not more than six months.

_____

(Signature or mark of voter.)

"Note: Your signature must be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older.

"Sworn to and subscribed before me this —— day of ————, 19——. I certify that the affiant is known (or made known) to me to be the identical party he claims to be.

———————— (Signature of official)

(Title of official)

_____

(Address of official)

OR

"1st Witness _____

Signature

_____

Print name

_____

Address

_____

City Zip Code

"2nd Witness _____

Signature

_____

Print name

_____

Address

_____

City Zip Code"

EDMONDSON, Circuit Judge, dissenting:

I know of no other case involving disputed ballots in which a federal court has intervened in a state election where the plaintiff failed to show, in fact, either:

1. that plaintiff had "lost" the election but would have won the election if lawful votes only had been counted (that is, the alleged constitutional error changed the election result); or

2. that it was impossible ever to know that his opponent (the apparent winner) had truly won the election because of the nature of the voting irregularities (that is, the alleged constitutional error placed in everlasting doubt what was the true result of the election).

Nothing is known in this case about whether the alleged illegalities have affected or will affect the outcome of the pertinent elections. Yet today we plow into Alabama's election process and uphold a preliminary injunction that, in effect, overrules a pre-existing state court order which had directed that the contested votes be counted. And, instead, the federal courts (basically, stopping short the state election processes) order that the contested votes be *not* counted at all. This high level of federal activity seems unnecessary and, therefore, improper. So, I conclude that the district court abused its discretion.

For all we or anyone else knows, if the contested absentee votes in this case were counted, plaintiffs' candidates would win the elections, even taking those contested votes into account. In such event, none of the plaintiffs would be aggrieved by the decision to count absentee ballots not strictly complying with the state's statute. I believe everyone involved in this election dispute would understand that a court's allowing the simple adding up of the contested absentee votes went to which candidate would *not* be the same thing as saying that the contested votes will have value ultimately, as a matter of law, for deciding the final, official outcome of the elections. But

instead of letting the votes be counted as an Alabama court has directed and then seeing *if* there is even a controversy about the election's outcome, the federal courts have jumped into the process and blocked the very step that might show there is no big problem to be dealt with by federal judges.[1] I would not interfere with the counting of the contested ballots, although I agree that all the ballots and envelopes and other election materials pertinent to the contested ballots should be maintained and protected so that additional judicial review, *if* needed, would be convenient and possible.

This difference with my colleagues is more than just academic bickering about technicalities. Federal courts are not the bosses in state election disputes unless extraordinary circumstances affecting the integrity of the state's election process are clearly present in a high degree. This well-settled principle—that federal courts interfere in state elections as a last resort—is basic to federalism, and we should take it to heart.

> Principles of federalism limit the power of federal courts to intervene in state elections, however. The Constitution leaves "the conduct of state elections to the states." *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir.1980). We have cautioned before against excessive entanglement of federal courts in state elections. "The very nature of the federal union contemplates separate functions for the states. If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute . . . ."

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[1] A showing that the state irregularity affects the outcome of the election has jurisprudential importance either because the controversy is not fully ripe for adjudication of the merits until the outcome is shown to be, in fact, in doubt or because in a case like this, a plaintiff just cannot show a violation of substantive, due process if he cannot show that what the state did or did not do made a real difference in the election.

Id. Burton v. State of Georgia, 953 F.2d 1266, 1268 (11th Cir.1992).

As I understand the law, "[o]nly in extraordinary circumstances will a challenge to a state election rise to the level of a constitutional deprivation." *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir.1986). To my way of thinking, the federal courts have acted too aggressively too soon and have, as a result, become entangled in Alabama's state election too much. At a time when we do not know whether the contested votes, in fact, will make any difference at all in the outcome of the elections, it is hard for me to say that I am now facing the kind of extraordinary circumstances—patent and fundamental unfairness *tied to concrete harm*—that will amount to a constitutional deprivation and that will justify significant federal interference in the election process of a state.

I would dissolve the district court's injunction except to the extent that the injunction requires all election materials in the defendants' control to be preserved and protected in a way (for example, keeping questionable individual absentee ballots and their envelopes together) that a fair review of the election remains, in fact, possible and convenient.[2] This limited relief should be

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[2] I also would certify no question now from this court to the Supreme Court of Alabama, although I agree that we need to know what the Alabama law is before we decide whether the Alabama law violates the Federal Constitution. *This case is before us on an appeal of a preliminary injunction.* (The parties in district court were not notified that the preliminary injunction hearing would also be *the* trial on the merits; the preliminary proceedings were rushed; it is not plain that the district court has heard all the evidence on such significant points as what was the custom for receiving and counting absentee ballots in the past.) By its nature, a preliminary injunction decides nothing finally. And, as a result, an appellate court reviewing the grant of the injunction is also not rendering its final judgment on the merits of the underlying case. The State of Alabama has been good enough to create a procedure by which federal courts can ask for guidance on matters of Alabama law. But Alabama's rule provides that the

enough to protect plaintiffs until the Alabama law becomes clear, assuming that there is a live controversy about this election after the contested ballots are counted.[3]

Some of the ideas expressed in today's court opinion are, to me, doubtful: such as the theory that Alabama's

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questions which federal courts ask Alabama's Supreme Court to answer must be questions "which are determinative of said cause," by which I understand us to be advised to send no questions that would not lead directly to the final resolution of the cause of action in federal court. Given the procedural posture of this case. I worry that certification from this court is probably an unauthorized imposition on the Alabama Supreme Court. If I were not dissenting otherwise. I would raise no question about the time and manner of certification. But I worry about the precedent we are setting. I do not want to abuse the certification process and, perhaps, wear out our wecome when we ask for help from state supreme courts.

The merits of this case remain to be decided finally in the district court. That court can (and I think should) certify the state law question speedily to the Alabama Supreme Court. Coming from the district court. I think it can be more accurately said that the certified question can be "determinative of said cause."

[3] This kind of injunction is far more narrow and far less intrusive on the state's affairs than the one granted by the district court or the modified injunction issued by this court. Depending on what the law of Alabama is (once it is definitively set out by Alabama's high court, by certification from the district court or otherwise), plaintiffs' likelihood of success on federal constitutional grounds could become pretty good. So, today I can say plaintiffs have a fair chance of success. Jumbling, in the meantime, of the contested absentee ballots with other ballots in such a way that evidence would be lost and that would obstruct further review would doubtedlessly result in irreparable harm and would be contrary to the public interest in honest elections. (This concern to ensure against the risk of vanished evidence also explains why this case is ripe for some adjudication now even when the state election process has not been concluded.) Given the serious nature of the harm and the importance of the public interest, some injunctive relief seems justified. I am confident that the parties and the district court could work out the details of how best to preserve the evidence and still not burden defendants too much.

legislature has the power in election contests to act contrary to the law of Alabama as declared by Alabama's highest court; the conclusion that an election contest before the legislative commission is inadequate to determine the legal issues raised by plaintiffs; the thought that only absolute identity of parties in the state court action and federal court action (without regard to state-case parties possibly under the control of or in privity with federal-case parties) will trigger a *Rooker-Feldman* bar in federal court; and the perception that a federal court order that countermands a preexisting Alabama court order maintains the status quo in Alabama.

Much of my objection to what this court says today, however, is not that I am sure that what it has said is wrong, but that, given the facts actually before us at this time, I am pretty sure it is unnecessary to decide or to speak about many of these sensitive issues. I see no need for a lot of immediate federal court action yet. I would wait a bit longer and let Alabama's election process finish (or come closer to finishing) before the federal courts cut in. I do know that bad facts can result in bad law,[4] and here the facts had they been allowed to develop fully might have been such that no law (good or bad) would have to be made.

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[4] Considering how much honest elections matter and considering the nature of the statewide offices in question, this case may also be seen as one in which the outcome is of unusual importance and immediate interest. "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Northern Securities Co. v. U.S.*, 193 U.S. 197, 400-01, 24 S.Ct. 436, 486-87, 48 L.Ed. 679 (1904) (Holmes, J., dissenting).

APPENDIX C

[Released Mar. 14, 1995]

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1994-95

1940461

LARRY ROE, *et al.*

v.

MOBILE COUNTY APPOINTMENT BOARD, *et al.*

(CV-94-7138)

LARRY ROE, *et al.*

v.

STATE OF ALABAMA, by and through its Attorney General, JEFF SESSIONS, *et al.*

(CV-94-7155)

CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PER CURIAM.

The United States Court of Appeals for the Eleventh Circuit asks: Does Alabama law permit or require some, but not all, absentee ballots which are sealed in envelopes signed by the voter, but not notarized or witnessed by two witnesses as required by § 17-10-7, Ala. Code 1975,

to be counted to determine the results of the general election held November 8, 1994?[1] The Eleventh Circuit states the question:

> "Whether absentee ballots that, on the accompanying affidavit envelope, fail to have two witnesses and lack proper notarization (for example, ballot envelopes that have only a signature or only one witness, or on which the voter and the notary have signed the ballot, but the notary fails to fill in the 'title of official') meet the requirements of Alabama Law, specifically Alabama Code Section 17-10-7, to be legal ballots due to be counted in the November 8, 1994 general election."

On November 8, 1994, Alabama held a general election. When the voting was complete, the preliminary unofficial results showed the race for Chief Justice of the Supreme Court to be extremely close, as was that for State Treasurer. Shortly after election day, it was discovered that, within the State of Alabama, ballots not in strict compliance with the statute had been counted in some counties and had not been counted in others. Because of the closeness of the tally, the treatment of some 2,000 uncounted absentee ballots by Alabama election officials became an issue. No one knows what the result of the election will be when these ballots are counted. It is known that ballots not legally distinguishable from these uncounted ballots have been counted.

Litigation History

The litigation involving the November 8th election began on November 11, 1994, when the Republican candidates for Chief Justice of the Supreme Court, Perry

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[1] To comport with the undisputed facts, the certified question has been recast pursuant to common practice. Wright, Miller, and Cooper, *Federal Practice and Procedure*, Jurisdiction 2d § 4248 p. 178 (1988); *Barnes v. Atlantic & Pacific Life Ins. Co. of America*, 530 F.2d 98 (5th Cir. 1976).

O. Hooper, Sr., and the Republican candidate for State Treasurer, James D. Martin, sought an *ex parte* temporary restraining order ("TRO") from Shelby County Circuit Court to secure all election records for an anticipated election contest. They named as defendants individuals who represented a class of persons composed of all Alabama election officials.[2] The circuit judge ordered the election officials to maintain the possession and security of all election materials, including absentee ballots and related affidavits. This order was served or sent by facsimile to voting officials throughout the state.

On November 16, 1994, voters Michael Lewis Odom and John W. Davis, each of whom had voted by absentee ballot, filed suit in the circuit court of Montgomery County, Alabama,[3] seeking a ruling that Davis's abstentee ballot, which is one among some 2,000 statewide absentee ballots sealed in envelopes signed by voters but not also notarized or signed by two witnesses, should be counted.[4] The plaintiffs sought a temporary restraining order that would enjoin Secretary of State James Bennett from certifying the results of the general election without counting the ballots that substantially complied with the absentee ballot form, pursuant to *Wells v. Ellis*, 551 So.2d 382 (Ala. 1989), and *Williams v. Lide* 628 So.2d 531 (Ala. 1993).[5]

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[2] Probate judges, sheriffs, circuit clerks, and custodians of voting machines in all counties in the State of Alabama.

[3] *Odom v. Bennett*, No. CV-94-2434-R, Circuit Court, Montgomery County.

[4] The affidavit of Jasper Fielding, Probate Judge of Coosa County, Alabama, states that John W. Davis's ballot had only one witness, and that his ballot was not counted.

[5] The defendants named in the suit were Secretary of State Bennett and three Montgomery County officials, Probate Judge Walker Hobbie, Jr., Circuit Clerk Debbie Hackett, and Sheriff Dan Jones, in their official capacities.

Judge Joseph D. Phelps convened a hearing on the TRO at approximately 6:00 p.m. and took testimony. He then issued a temporary restraining order from the bench giving the court an opportunity to hear, and the parties an opportunity to present, at a full hearing, evidence and law on the issue of whether or not there were absentee ballots wrongfully excluded. The next morning Judge Phelps issued a written order enjoining the Secretary of State from certifying and counting the election results until a full hearing could be held in this cause or until further order of this Court.

That afternoon, a hearing was held before Judge Eugene W. Reese.[6] Present at the hearing was Algert S. Agricola, Jr., representing the Republican Party, which sought and was granted leave to intervene. Subsequently, Judge Reese held that absentee ballots should be counted if they met the "substantial compliance" standard articulated in *Wells v. Ellis,* 551 So.2d 382 (Ala. 1989), and *Williams v. Lide,* 628 So.2d 531 (Ala. 1993). His order stated:

> "In accordance with *Williams v. Lide,* those persons counting the absentee ballots for each county shall count each ballot which contains: (1) the place of residence of the person casting the ballots; (2) the reason for the vote or voting by absentee ballots; and, (3) the signature of the voter. Absentee ballots may not be excluded from being counted because of a lack of notarization or a lack of witnesses."
>
> ". . . .
>
> "Further, Defendant [Secretary of State James] Bennett is enjoined from certifying and/or compiling vote totals in all races until the recounting of the absentee ballots has been effected and until he has

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[6] When the case was filed, it was assigned to Judge Reese by the automated assignment system maintained by the Clerk's office when it was filed. Because Judge Reese had left the courthouse on November 16 before the complaint was filed at 5:23, the TRO complaint was presented to Judge Phelps.

> received all of the amended recertifications reflecting the recounting of the absentee ballots. At the time Defendant Bennett receives all of the amended recertifications, then Defendant Bennett shall certify the election results in all races."

This order was filed with the circuit clerk on November 17, 1994.

As the record reflects, the Republican Party had already obtained a TRO in Shelby County Circuit Court for election officials to maintain the possession and security of all election materials, including absentee ballots and related affidavits. The question of whether absentee ballots that met the *Williams v. Lide* test for substantial compliance should be counted was being litigated in the Montgomery County Circuit Court and was ripe for state appellate review. However, no appeal was taken from Judge Reese's order. Although Mr. Agricola gave oral notice of appeal in open court, he never filed a notice of appeal. Under Alabama law, an appeal will lie if filed within 14 days after an order granting a preliminary injunction. Had the Republican Party appealed from the order of the Circuit Court of Montgomery County issued in November, 1994, the entire controversy involving the November general election would have been resolved long ago. The people of Alabama would have known the outcome of the election, and the losing candidates, had they chosen to do so, could have contested the elections in the state legislature.

Counsel for the Republican Party, Algert S. Agricola, Jr., for "strategic reasons," decided that it was in the best interests of his clients, the Republican candidates, Hooper and Martin, to seek relief in a federal forum. Those candidates, along with Larry Roe (a voter who voted for these Republican candidates), filed a complaint in the U.S. District Court for the Southern District of

Alabama in Mobile. The plaintiffs were represented by Albert L. Jordan, Joseph S. Johnston, and J. Michael Druhan. Mr. Agricola subsequently joined these lawyers as counsel for the Republican candidates. The defendants were the Mobile County Appointing Board, Mobile County Probate Judge Lionel W. Noonan, the Wilcox County Appointing Board, and Wilcox County Probate Judge Jerry Boggan.[7] The complaint sought relief pursuant to 42 U.S.C. §§ 1983, 1988; 28 U.S.C. §§ 2201, 2202; and the All Writs Act, 28 U.S.C. § 1651. United States District Judge Alex F. Howard held an *ex parte* hearing and, on November 18, 1994, issued an *ex parte* TRO that enjoined "All Persons Who Are Designated by Alabama State Law as the Appointing Board in Each of Alabama's Counties . . . ." to refrain from taking any action to alter any ballots or other election materials. This same relief had previously been sought by the same parties and ordered by the state circuit court in Shelby County.

On November 18, 1994, Republican voter Ralph E. Bradford, Sr., an African-American, brought suit in the U.S. District Court for the Northern District of Alabama under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973, seeking to enjoin the counting of the absentee ballots that the Circuit Court of Montgomery County had ordered to be counted.[8] Bradford's suit claimed that the state court order amounted to a change within the scope of the preclearance requirement of Section 5 of the Voting Rights Act and that the alleged change had not been precleared. Bradford was also represented by

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[7] The defendants were named as representatives of those persons who are designated by Alabama state law as the Appointing Boards in each of Alabama's counties and those persons who are designated by law to maintain the possession and security of all materials relating to the November 8, 1994, election.

[8] *Bradford v. State of Alabama, et al.*, CV-94-PT-2816-M (N.D. Ala.), November 25, 1994.

Algert S. Agricola, Jr., who represented the Republican Party in the Circuit Court of Montgomery County, and by Albert L. Jordan and B. Glenn Murdock, Agricola's co-counsel in the U.S. District Court, Southern District of Alabama. Michael Lewis Odom and John W. Davis, the plaintiffs in the case before the Circuit Court of Montgomery County, intervened in the *Bradford* suit.

Judge Robert B. Propst, U.S. District Judge, Northern District, issued an order the same day Bradford filed suit that temporarily restrained the counting of the absentee ballots. Later that day, a three-judge panel, consisting of U.S. District Judges Robert B. Propst and James H. Hancock and U.S. Court of Appeals Judge Emment R. Cox, reaffirmed the TRO and directed Secretary of State Bennett and the county appointing boards to stop counting the absentee ballots.

On November 22nd, a hearing was convened on Bradford's motion for a preliminary injunction before the three-judge panel. At this hearing, the defendants (state election officials) presented a letter from the United States Department of Justice preclearing the November 16, 1994, order of the Circuit Court of Montgomery County, under the Voting Rights Act. This letter stated:

> "Under the proposed change, absentee ballots would be accepted in all cases where the absentee form contains, at minimum, the voter's (1) place of residence, (2) reasons for voting absentee, and (3) signature. It appears most accurate to characterize the instant change as the implementation of a uniform standard for counting absentee ballots in the state. It is clear from all accounts that the actual practice and standards for accepting absentee ballots has varied considerably among Alabama's 67 counties, and the substantial compliance rule, or some variation of it, appears to have been the rule in a number of Alabama counties for a considerable period. Voters in such counties have come to rely on

> an absence of any strict requirement that all information sought in the state code absentee voter form be provided. In each such county, we note, a change to strict compliance would itself constitute a voting change with a potential for discrimination, and would itself require Section 5 preclearance prior to any implementation by the state (i.e., prior to rejection of any such ballots) notwithstanding the code language. *Perkins v. Matthews*, 400 U.S. 379 (1971). We also note that the announcement by the Alabama Supreme Court of the standard in *Williams v. Lide* appears to have prompted some reliance by voters on that standard for this election."

Letter of John K. Tanner, Acting Chief, Voting Section, Civil Rights Division, U.S. Department of Justice, to Marc Givhan, Deputy Attorney General, State of Alabama. The three-judge panel then requested clarification of this letter, posing these questions:

> "Was it the intent of the Attorney General of the United States, in the letter dated November 22, 1994 to Marc Givhan, Deputy Attorney General, State of Alabama, not to interpose objection(s) to the following:
>
> > "1. The order of the Circuit Court of Montgomery County, Alabama in *Michael Lewis Odom, et al. v. Jim Bennett, et al.*, CV 9402434, which directed that voting officials count absentee ballot votes neither witnessed nor notarized as apparently required by § 17-10-7 of the Code of Alabama 1975?
> >
> > "2. The application of said Montgomery County, Alabama Circuit Court order to absentee ballot votes cast in the November 8, general election?"

A letter of clarification was received that afternoon. It confirmed that the U.S. Department of Justice under-

stood Judge Reese's order to require that "absentee ballots cannot be rejected on the basis of the absence of two witnesses or notarization" and that the Justice Department precleared the order on that basis. The Justice Department's letter stated:

> "The November 16, 1994 order in *Odom* was included in your submission, and the change was precleared on that basis. Under the precleared change, absentee ballots cannot be rejected on the basis of the absence of two witnesses or notarization, or for the omission of other information called for in the form set forth at Section 17-10-7, so long as such ballots do contain the information required by the court in *Odom*."

Letter of John K. Tanner, Acting Chief, Voting Section, Civil Rights Division, U.S. Department of Justice, to Marc Givhan, Deputy Attorney General, State of Alabama.

At the beginning of the hearing, Bradford amended his complaint to add claims under Section 2 of the Voting Rights Act and 42 U.S.C. § 1983. He alleged that the counting of the absentee ballots in question would violate his federal constitutional rights. This is the exact relief that candidates Hooper and Martin sought in the United States District Court for the Southern District. At the conclusion of the hearing, Judge Robert B. Propst [9] stated his view that the decision of the Eleventh U.S. Circuit Court of Appeals in *Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986), barred the relief under Section 2 of the Voting Rights Act, that Bradford sought by his amended complaint in the federal courts. Judge Propst observed:

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[9] Judge Propst, the judge to whom all single-judge matters were assigned in *Bradford*, is widely respected for the depth of his legal scholarship.

"But *Curry v. Baker,* I think, could be appropriately cited with regard to your amended complaint. Certainly as it relates to the due process claims or the equal protection claims because *Curry v. Baker* is much more binding on this court than the three-judge panel decision in *Henderson v. Graddick.* And I think that one reason that I certainly wouldn't be able to just this afternoon jump up and start enjoining something based on the amended complaint would be because of *Curry v. Baker.*

"Now, I don't think that there was a Section 2 claim in—voting rights Section 2 in *Curry v. Baker,* there may have been. If there was, *Curry v. Baker* probably tends to dispose of it just like it disposed of the equal protection claim and, you know, and I am just not too inclined without some briefing to go down that same *Curry v. Baker* path because what happened in *Curry v. Baker* that also followed a three-panel Section 5 claim and I am just not too inclined to follow that same path."

On November 25, 1994, the three-judge panel dissolved its temporary restraining order and refused to issue a preliminary injunction under Section 5 of the Voting Rights Act. The three-judge panel dismissed the claims under Section 5 of the Voting Rights Act and refused to entertain the constitutional claims allegedly made under Section 2 of the Voting Rights Act. Judge Propst explained:

"As this judge made plain at the hearing on November 22, the decision of this court to dissolve its own restraining order had no effect on, nor did it conflict with, the ruling of any other court, state or federal. The three-judge panel in this case sat as a trial court. not an appellate court. To this judge's knowledge the action in this case was the only pending case which addressed § 5 of the Voting Rights Act. That was the only federal law addressed by

this court. The attorneys, of course, were well aware of the foregoing. Their clients should have no misunderstanding."

Bradford, footnote 1, page 2.

On the morning of November 23, 1994, U.S. District Judge Alex T. Howard placed a telephone call to Secretary of State Bennett, who was not a party to this case at that time. During the call, Judge Howard instructed Bennett that he had entered an order to preserve evidence, including absentee ballots, for a possible contest. Judge Howard told Bennett that counting the absentee ballots in question would be a violation of the restraining order, which he had previously issued in this case, because the ballot envelopes would have to be opened in order to count the ballots. He also threatened Secretary of State Bennett with contempt sanctions if the ballots were counted. At 11:30 a.m. on the same day, Judge Howard issued a written order *sua sponte,* amending his prior TRO. In this new TRO, Judge Howard ordered Secretary of State Bennett to refrain from certifying any election results in the elections of Hooper and Martin, notwithstanding any order of the Montgomery County Circuit Court.

On November 28, 1994, the plaintiffs amended their complaint in the United States District Court, Southern Division, to allege claims against Secretary of State Bennett in his official capacity and to add all circuit clerks, probate judges and sheriffs as class defendants, as well as to add John Davis, a plaintiff in the case before Judge Reese, as a defendant and the representative of a class of absentee voters who submitted ballots that were signed by the voter, but lacked either notarization or the signatures of two witnesses in the November election (the "Davis class"). Further, the plaintiffs added claims that the counting of the ballots would violate their rights under Section 2 of the Voting Rights Act and 42 U.S.C. § 1983,

the exact claim they had made in the U.S. District Court for the Northern District. They sought a declaratory judgment by the U.S. District Court declaring the order of the Montgomery County Circuit Court issued by Judge Reese to be null and void. They also sought a preliminary and a permanent injunction requiring the defendants to preserve all materials relating to the election. Attorneys Johnston, Druhan, and B. Glenn Murdock, all of whom represented parties in the U.S. District Court for the Northern Division, signed the complaint. Algert S. Agricola, Jr., counsel for the Republican Party before the Circuit Court of Montgomery County, filed a notice of his appearance as additional counsel for plaintiffs. Agricola also represented plaintiffs in the Northern District *Bradford* litigation.

On November 29, 1994, Secretary of State Bennett filed a motion to dissolve or amend the *ex parte* order or for a stay pending appeal. The basis of Bennett's motion was that federal Judge Howard had ordered him *not* to count absentee ballots, while Judge Reese had ordered him to count those absentee ballots that met the substantial compliance test of *Williams v. Lide*.

The question of whether state law required state election officials to count absentee ballots substantially in compliance with the requirements of Alabama's election statutes was pending in the state courts of Alabama, and an order of a circuit court directly addressing this issue was outstanding. Under Alabama law, an expedited appeal could have been taken from that order. No appeal was taken.

On December 5, 1994, Judge Howard held a hearing not only on the preliminary injunction, but also on the plaintiffs' newly added claims (alleging violations of Section 2 of the Voting Rights Act, due process, and equal protection)[10], which collaterally attacked the order of the

[10] The defendants objected to the consideration of the new claims.

state circuit court. That afternoon, Judge Howard issued a preliminary injunction, which held that the plaintiffs had a constitutional right for the ballots not in strict compliance with the statute *not* to be counted. His order effectively disfranchised John Davis and other members of the "Davis class," none of whom was alleged to be an unqualified voter. There was no evidence that any uncounted vote was tainted in any way. There was no evidence of voter fraud. There was no evidence that any irregularities in any uncounted ballot affected the sanctity of the ballots in any way. There was no evidence that the integrity of the election would be affected by the counting of these ballots. Even so, Judge Howard ordered Secretary of State Bennett to certify the election result *without* the absentee ballots being counted. Federal Judge Howard's order is in direct conflict with the previously issued order of the Circuit Court of Montgomery County.

The defendants sought a stay or modification from Judge Howard. He denied these motions. The defendants appealed to the U.S. Court of Appeals, Eleventh Circuit. By December 6th, a motion for a stay had been filed with the appellate court. On that date, despite the pendency of the motion for a stay in the Eleventh Circuit, Judge Howard again called Secretary of State Bennett and stated that he had issued a preliminary injunction. Secretary of State Bennett filed a motion on December 7th, seeking to prevent any party from filing a motion for contempt against him. On December 8, plaintiffs filed a petition for rule nisi seeking contempt sanctions against Secretary of State Bennett. On the morning of December 9th, Judge Howard denied Bennett's motion for a stay and issued a rule nisi giving the Secretary of State three hours in which to "show cause why he should not be held in civil contempt of this Court for failure to abide by this Court's preliminary injunction of December 5, 1994." Shortly before the three hours were up, the Eleventh Circuit stayed all efforts by Judge How-

ard to enforce contempt proceedings against the Alabama Secretary of State.

On January 4, 1995, a three-judge panel of the Eleventh Circuit, consisting of Chief Judge Tjoflat, Judge Edmondson, and Judge Birch, issued its order. Chief Judge Tjoflat and Judge Birch upheld the preliminary injunction in this case and certified the question under our certification rule.

Judge Edmondson dissenting, stating:

> "I know of no other case involving disputed ballots in which a federal court has intervened in a state election where the plaintiff failed to show, in fact, either:
>
> > "1. that plaintiff had 'lost' the election but would have won the election if lawful votes only had been counted (that is, the alleged constitutional error changed the election result); or
> >
> > "2. that it was impossible ever to know that his opponent (the apparent winner) had truly won the election because of the nature of the voting irregularities (that is, the alleged constitutional error placed in everlasting doubt what was the true result of the election).
>
> "Nothing is known in this case about whether the alleged illegalities have affected or will affect the outcome of the pertinent elections. Yet today we plow into Alabama's election process and uphold a preliminary injunction that, in effect, overrules a pre-existing state court order which had directed that the contested votes be counted. And, instead, the federal courts (basically, stopping short the state election processes) order that the contested votes be *not* counted at all. This high level of federal activity seems unnecessary and, therefore improper. So, I conclude that the district court abused its discretion."

Thus, two members of the three-judge panel affirmed Judge Howard's preliminary injunction that invalidates a judgment issued by the Circuit Court of Montgomery County and interrupts the resolution of this election dispute by the state courts of Alabama. The panel takes this action, although no appeal from Judge Reese's order was taken to the Alabama Supreme Court, although counsel for the parties before both the state and federal courts was the same, and although attorney Agricola announced that he would appeal Judge Reese's order. He later told Judge Reese that, for strategic reasons, the decision was made to proceed to the federal courts instead of pursuing an appeal from Judge Reese's order.

Federalism and Federal Precedent

The bar to federal jurisdiction under the facts of this case as established by *Curry v. Baker,* 802 F.2d 1302 (11th Circuit 1986), and abundant additional federal authority cited below is clear. Additionally, principles of federalism, comity, and the Full Faith and Credit Clause of the Constitution mandate that federal courts permit state court litigation to proceed to a resolution of state election disputes, and should not intervene to stop that state process.

Judge Howard entertained the Republican candidates' Section 2 Voting Rights Act claim and federal constitutional due process and equal protection claims after the three-judge panel in *Bradford* refused to do so. *Res judicata* should have foreclosed a relitigation in a second federal court. Judge Howard, in entertaining these claims, also refused to follow the decision of the Eleventh Circuit in *Curry v. Baker,* 802 F.2d 1302 (11th Cir. 1986), which prevents a federal court from interfering with the state courts' resolution of a dispute such as that involved in this case. As the Eleventh Circuit recognized and emphasized in *Curry v. Baker,* the U.S. Constitution and 42 U.S.C. § 1983 do not provide federal courts with

the authority ot intervene in state elections, except in rare matters. "Only in extraordinary circumstances will a challenge to a state election rise to the level of a constitutional deprivation." *Curry,* 802 F.2d at 1314.

Curry v. Baker involved a primary runoff election for the Democratic candidate for Governor of Alabama in which there was massive illegal cross-over voting. Following the primary, the State Democratic Committee certified the candidate (William Baxley) receiving the majority of the legal votes over the candidate (Charles Graddick) receiving the majority of votes. Graddick and his supporters brought suit in the U.S. District Court alleging violations of due process and equal protection. The U.S. district judge ordered the Democratic Party to conduct a new primary and enjoined the disqualification of Graddick. A three-judge panel of the Eleventh Circuit reversed that judgment and remanded the case to the district court, stating:

> " 'The functional structure embodied in the Constitution, the nature of the federal court system and the limitations inherent in the concepts both of limited federal jurisdiction and of the remedy afforded by § 1983' operate to restrict federal relief in the state election context. (Citations omitted.) Although federal courts closely scrutinize state laws whose very design infringes on the rights of voters, federal courts will not intervene to examine the validity of individual ballots or supervise the administrative details of a local election. *Griffin v. Burns,* 570 F.2d 1065, 1078 (1st Cir. 1978). Only in extraordinary circumstances will a challenge to a state election rise to the level of constitutional deprivation. In *Gamza,* reh'g denied, 625 F.2d 1016 (5th Cir. 1980), our predecessor court
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> > 'recognize[d] a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in

> the dilution of an individual's vote. Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a [constitutional violation].'
>
> 619 F.2d at 453.
>
> ". . . In evaluating claims arising from 'episodic events,' courts have followed the general rule that 'if the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots.' (Citations omitted.) As with much of the law of substantive due process, there are no bright lines distinguishing 'patent and fundamental unfairness' from 'garden variety' election disputes.
>
> "*Gamza* [*v. Aguirre,* 619 F.2d 449 (5th Cir. 1980)], posed this issue in clear terms. Gamza and four of his supporters alleged that election officials had negligently and unlawfully performed the vote count, thereby costing him the election. The Fifth Circuit found that plaintiff failed to state a constitutional deprivation under § 1983.
>
> " 'In the absence of evidence that the alleged maladministration of the local election procedures was attended by the intention to discriminate against the affected voters or motivated by a desire to subvert the right of the voters to choose their . . . representative, we cannot conclude that the error constituted a denial of equal protection of the laws.'
>
> 619 F.2d at 454."

Curry, 802 F.2d at 1314-15.

The three-judge panel in *Curry* criticized the United States District Court for becoming engulfed in the morass

of election details, which were held properly left to state election officials and state court and held:

> "There is no evidence that plaintiffs lacked adequate remedy in the state courts. Alabama law provides an adequate procedure for addressing election irregularities. . . . A federally protected right 'is implicated where the entire election process—including as part thereof the state's administration and judicial corrective process—fails on its fact to afford fundamental fairness. That is not the case here. State process was available but it was not used. Even if plaintiffs claimed deprivation had risen to a constitutional level, . . . the Court erred in failing to give suffiicent weight to the substantial state interest served in this case. . . ."

Id. at 1316-17. Judge Godbold noted in *Curry*: "Even in cases involving overt racial discrimination, this court has considered the voiding of a state eelction to be 'drasctic, if not staggering . . . and therefore a form of relief to be guardedly exercised.' *Bell v. Southwell,* 376 F.2d 659, 662 (5th Cir. 1967)." *Id.* at 1315.

The *Curry* court noted that Alabama law provides an adequate procedure for addressing election irregularities, citing the election contest provisions found in § 17-15-1 et seq., Ala. Code 1975. A state process was available, but it was not used. The same state procedure is still available in Alabama at this time. Once the election results of the November 8 election are certified, the losing candidate has a statutory right to contest the election. The *Curry* Court stated that federal courts should not become involved in state election disputes:

> "in the absence of aggravting factors such as denying the right of citizens to vote for reasons of race, or fraudulent interference with a free election by stuffing of the ballot box, or any other unlawful conduct which interferes with the individual's right to vote."

Id. at 1316 (citing *Pettengill v. Putnam County R-1 School District, Unionsville, Md.*, 472 F.2d 121, 122 (8th Cir. 1973)).

Other federal circuits have consistently reached the conclusion that the states should be primarily responsible for regulating their own elections. In *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), the First Circuit recognized that the Constitution confers the power to control the disposition of contests over elections to state and local offices. *Griffin v. Burns*, supra at 1077 (quoting *Hubbard v. Ammerman*, 465 F.2d 1169, 1176 (5th Cir. 1972), *cert. denied*, 410 U.S. 910, 93 S.Ct. 967 (1973) (wherein the Court stated that the U.S. Constitution confers upon the states the "power to control the disposition of contests over elections to . . . state and local offices" (citation omitted))). However, the federal court in *Griffin* ruled that due process required federal action because 1) the federal court was the only practical forum for redress, 2) there was no standard state procedure for handling the claim, and 3) the state court did not confront the question.

In *Powell v. Power*, 436 F.2d 84 (2nd Cir. 1970), six voters against whom the statute of limitations had run on a state claim sought federal relief under the Voting Rights Act and 42 U.S.C. § 1983. At issue was a close congressional primary election where, by mistake, a number of persons not members of the party holding the primary were allowed to vote. The Second Circuit rejected the § 1983 claim on the grounds that the due process clause and article I, section 2 [of the U.S. Constitution] offer no guarantee against errors in the administration of an election. Reasoning that the federal courts are not equipped or empowered to supervise the administration of a local election, the Second Circuit ventured that if every election irregularity involved a federal violation, the court would "be thrust into the details of virtually every election, tinkering with the state's election

machinery, reviewing petitions, registration cards, vote tallies and certificates of election for all manner of error and insufficiency under state and federal law." *Powell,* 436 F.2d at 86.

The Fourth Circuit, when presented with a suit by three unsuccessful candidates for public office, upheld dismissal in favor of all defendants. The Fourth Circuit noted:

> "Our constitution does not contemplate that the federal judiciary routinely will pass judgment on particular elections for federal, state or local office. The conduct of elections is instead a matter committed primarily to the control of states, and legislative bodies are traditionally the final judges of their own membership. The legitimacy of democratic politics would be compromised if the results of elections were regularly to be rehashed in federal court. Federal courts, of course, have actively guarded the electoral process from class-based discrimination and restrictive state election laws. . . . In this essentially factual dispute, we defer to those primarily responsible for elections and we refuse to authorize yet another avenue for those disgruntled with the political process to keep the contest alive in the courtroom."

Hutchinson v. Miller, 797 F.2d 1279, 1280 (4th Cir. 1986), *cert. denied,* 479 U.S. 1088, 107 S.Ct. 1295 (1987). The plaintiffs in *Hutchinson* alleged irregularities in the general election and sought damages under 42 U.S.C. § 1983 and 18 U.S.C. § 1964 (the Racketeer Influenced and Corrupt Organizations Act). The Fourth Circuit stated that it must refrain from considering the particulars of disputed elections, especially in a suit for damages, because:

> "To do otherwise would be to intrude on the role of the states and the Congress, to raise the possibility

> of inconsistent judgments concerning elections, to erode the finality of results, to give candidates incentives to bypass the procedures already established, to involve federal courts in the details of state-run elections, and to constitute the jury as well as the electorate as an arbiter of political outcomes. These costs, we believe, would come with very little benefit to the rights fundamentally at issue here—the rights of voters to fair exercise of their franchise. . . ."

Hutchinson, 797 F.2d at 1285.

In *Welch v. McKenzie,* 765 F.2d 1311 (5th Cir. 1985), *motion to withdraw judgment denied,* 777 F.2d 191 (5th Cir. 1985), the Fifth Circuit ruled that a federal court should not intervene in a state election dispute where it was alleged that votes were improperly counted. Characterizing the dispute as a "garden variety," the Fifth Circuit ruled that it did not rise to the level of a constitutional deprivation. Citing *Gamza v. Aquirre,* 619 F.2d 449 (5th Cir. 1980), as controlling, the Fifth Circuit held that the claim was not actionable in federal court because our federal system contemplates that states will be primarily responsible for regulating their own elections. *Welch,* 765 F.2d at 1317. *Gamza* concerned a claim brought under 42 U.S.C. § 1983 by a candidate, who lost a school board election in Texas, and his supporters. The Fifth Circuit declined federal involvement in the case, stating:

> "We must, therefore, recognize a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote. Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause."

Gamza, 619 F.2d at 453. The Fifth Circuit noted:

> "The very nature of the federal union contemplates separate functions for the states. If every state election irregularity were considered a federal constituitonal deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the election process, would be superseded by a section 1983 gloss. (citations omitted). Section 1983 did not create a delictual action for the torts of state officials, see *Baker v. McCollan*, 443 U.S. 137, 146, 99 S. Ct. 2689, 2695-96, 61 L.Ed.2d 433 (1979), and it did not authorize federal courts to be state election monitors. For these reasons we have concluded that the denial of a nominee's right to a position on a ballot by an episodic election irregularity in a county primary election does not deprive his supporters of a federal constitutional right. (citations omitted)."

Id. at 453-454.

The Seventh Circuit in *Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975), refused to act in a case involving the malfunction of voting machines in a county election. The Court distinguished the voting machine problem in that case from willful conduct, which undermines the organic processes by which candidates are elected. The Court reasoned that only the latter type of claim would give rise to a constitutional claim under 42 U.S.C. § 1983.

In *Pettengill v. Putnam County R-1 School District, Unionsville, Mo.*, 472 F.2d 121 (8th Cir. 1973), the plaintiff claimed that the right to vote had been diluted by the defendant's improper counting of ballots. The Eighth Circuit determined that "it was not the federal court's role to 'oversee the administrative details of a local election.' " *Pettengill*, 472 F.2d at 122. The Court found no constitutional grounds for intervention "in the absence of aggravating factors such as denying the right of citizens to vote for reasons of race, or fraudulent interference with a free election by stuffing of the ballot box, or any other unlawful conduct which interferes with the individual's right to vote." *Id.* (citations omitted).

In support of their claims of constitutional deprivation, the plaintiffs rely upon *Griffin v. Burns*, supra, and *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981). These cases are clearly distinguishable from the present case, however, since, in both cases, state action had disfranchised a substantial portion of the electorate, whereas the plaintiffs in this case are complaining that a portion of the electorate has been improperly enfranchised by the state court order. In *Griffin* and *Duncan*, once the voters were disfranchised, no other legal remedies existed for them to pursue under state law. Here, however, adequate post-election procedures exist under Alabama law. There is no constitutional deprivation because state remedies exist that adequately protect any interest the plaintiffs may have.

The plaintiffs have a fair remedy under state law that protects their interests, while not automatically disfranchising an entire class of voters, in the election contest procedure. § 17-15-1 through § 17-15-63, Ala. Code (1975). This procedure has been held to be adequate and fair by the Eleventh Circuit in *Curry v. Baker*, supra at 1316-17. The ruling of *Curry v. Baker* is supported by he Eleventh Circuit's recent holding in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*,

McKinney v. Osceola County Bd. of Com'rs, —— U.S. ——, 118 S.Ct. 898 (1995), in which the Court of Appeals emphasized that if state law provides a means by which an action in question may be challenged, then one does not have a procedural due process claim in the federal courts.

By issuing and upholding an injunction in this case, the federal courts have violated the basic tenets of federalism and the long-standing rule against interference by federal courts in state election matters. Such action violates the "*Rooker-Feldman* doctrine." *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 44 S.Ct. 149 (1923); *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303 (1983). The doctrine was explained by the Eleventh Circuit in *Liedel v. Juvenile Court of Madison County, Ala.,* 891 F.2d 1542, 1645 (11th Cir. 1990) (quoting from *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 483-84 n. 16, 103 S.Ct. 1303, 1315-16 n. 16 (1983));

> "Lower federal courts possess no power whatever to sit in direct review of state court decisions. If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial [of a claim] in a judicial proceeding . . . then the district court is in essence being called on to review the state court decision. This the district court may not do."

The Republican plaintiffs seek to evade the *Rooker-Feldman* doctrine on the grounds that it is not they, but their party, that intervened in *Odom v. Bennett.* This argument has no merit. The interests of these Republican candidates are identical to the interests of the Republican Party and to permit them to evade *Rooker-Feldman* on this basis would destroy it. In addition to having the same lawyers, the plaintiffs have the closest possible relationship to the Republican Party. They are executive officers of the Republican party.

In addition to the above-discussed principles of federalism, the federal courts have developed a doctrine of abstention. The abstention doctrine, like recusal, involves perhaps a more subjective analysis by federal courts, but, in this case, it appears that the federal courts should have abstained from exercising jurisdiction. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941).[11]

Alabama Law

When all of the litigation in this dispute is over, and the single legal issue has been decided, and the results of the election of November 8th are certified, an aggrieved party has the right under § 17-15-1 et seq., Ala. Code 1975, and § 115 of the Alabama Constitution to

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[11] The abstention doctrine has been explained as follows:

> "Thus was born what has come to be known as Pullman-type abstention. If there are unsettled questions of state law in a case that may make it unnecessary to decide a federal constitutional question, the federal court should abstain until the state court has resolved the state questions. This leads to an authoritative answer, rather than merely a forecast on the state questions, and depending on how the state questions are answered, may make it unnecessary to decide the federal constitutional question."

Wright, Miller, and Cooper, *Federal Practice and Procedure*, Jurisdiction 2d § 4241, p. 8 (1988). Thus, a federal court "may, and ordinarily should, refrain from deciding a case in which state action is challenged in federal court as contrary to the federal constitution if there are unsettled questions of state law that may be dispositive of the case and avoid the need for deciding the constitutional question." *Id.* at § 4242, p. 30.

The Eleventh Circuit, while recognizing the abstention doctrine, has dismissed it and concluded that to leave the plaintiffs to their state remedies is neither workable nor appropriate in this case. Why not? This statement is particularly surprising in view of the fact that the Eleventh Circuit sanctioned Alabama's election contest statutes, §§ 17-15-1 et seq., as providing an adequate procedure for addressing election irregularities. *Curry v. Baker*, 802 F.2d 1302, 1317 (11th Cir. 1986).

file a contest of the election in the legislature. No court, state or federal, has jurisdiction to hear evidence in an election contest for a statewide election, such as is involved here. A losing candidate, when the votes are certified, has a right to contest the election in the state legislature under the procedures established by § 17-15-1 et seq., of the Code.

Our certification procedures assume that any federal court certifying a question to this Court has jurisdiction of the underlying cause and that the answer to the question is determinative of the cause. The procedure providing for certified questions was adopted to further the return to federalism in this country. Those who drafted the rule, a group including several present members of this Court, never imagined that the federal courts would assume jurisdiction of a case previously decided by a state court, invalidate the order of the state court, ignoring federal precedent in doing so, and then have another federal court, on appeal from a preliminary injunction—where the parties had no notice that the hearing would be on the merits and which is, at best, entered on an incomplete record—ask this Court to answer a question of state law, stating at the same time that the answer of this Court will not be considered in that federal appellate court, no matter what the answer is, in determining the case.

Rule 18(a) of the Alabama Rules of Appelalte Procedure provides:

> "(a) When Certified. When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal court may certify such questions or propositions of law of this State to the Supreme Court of Alabama for instructions concerning such

> questions or propositions of state law, which certified question the Supreme Court of this State, by written opinion, may answer."

Here the opinion that accompanies the question indicates that the answer supplied by this Court will not be determinative. We are asked to answer the question in the context of an election, the outcome of which is unknown to anybody. As Judge Edmondson observed in his dissent, this should be reason enough to put off intervention by the federal courts, at least until candidates Hooper and Martin can show that they have been injured by the Alabama practice. Judge Edmondson stated:

> "At a time when we do not know whether the contested votes, in fact, will make any difference at all in the outcome of the elections, it is hard for me to say that I am now facting the kind of extraordinary circumstances—patent and fundamental unfairness *tied to concrete harm*—that will amount to a consttiutional deprivation and that will justify immediate significant federal interference in the election processes of a state."

(Emphasis in original.)

The Eleventh Circuit's opinion actually frames the plaintiffs' claims as hypothetical, then concludes that they are sufficient to allege the violation of a constitutional right, as required under 42 U.S.C. § 1983. No one in Alabama or anywhere else knows who will win the election for Chief Justice when the uncounted ballots are counted. The results of the election have not been determined. The winner has not been certified. The loser, when the result is determined, has a statutory and right to contest the election in the state legislature.

As a practical matter, it is only after all of the votes have been counted, the election results have been certified, and either the time for an election contest has elapsed, or a contest has been concluded that conclusive

effect is given to the ballots cast in an election. The validity and propriety of a given ballot is reserved for determination in the election contest procedure provided under Alabama law. *Reed v. City of Montgomery*, 376 So.2d 708, 711 (Ala. 1979). The election contest procedure embodied in §§ 17-15-1 et seq., Code of Alabama, was held by the Eleventh Circuit to provide an adequate procedure for addressing election irregularities. *Curry v. Baker*, 802 F.2d 1302, 1317 (11th Cir. 1986).

The absentee ballots in question have yet to be given any legal, operative effect by the State of Alabama in these elections. Plaintiffs' contention that they will suffer a deprivation of their due process rights when these absentee ballots are counted is pure speculation. No one knows for whom these voters cast their ballots. Thus, there is a crucial flaw in the plaintiffs' claims of vote dilution. As of this date, the plaintiffs have suffered no harm. Because these absentee ballots have not been opened or counted, it is impossible to ascertain whether the plaintiffs' votes will be "diluted" by votes for the Democratic Party candidates as they claim, or "bolstered" by votes for the Republican Party nominees.

Our certification procedure permits us to answer questions from any United States court. It does not authorize us to answer hypothetical questions, and it assumes that a federal court certifying a quesion to us has jurisdiction of the underlying case. Our Constitution requires that there be an actual "case or controversy" in order for the federal courts to exercise subject matter jurisdiction. Article III, Section 2, U.S. Constitution. We question whether a hypothetical claim of deprivation of due process rights as exists in the present case is sufficient to bestow jurisdiction on the federal courts.

The exact same question as that certified to us by the Eleventh Circuit is pending final determination in the Circuit Court of Montgomery County, *Odom v. Bennett*, CV 94-2434, where the lawyers representing the parties

in that litigation are the same as those involved in the question certified to us by the Eleventh Circuit. Part of the record in *Odom v. Bennett* is before the Eleventh Circuit in this case and has been submitted to us by the Eleventh Circuit as part of its record in this case. Additional evidence has been presented to the Circuit Court, since the hearing was held before the Eleventh Circuit. Because the litigation presents a question of state law which is determinative of this certified question, this Court has directed the Clerk of the Montgomery County Circuit Court to certify the record in *Odom v. Bennett* to this Court.[12] This enables this Court, notwithstanding its reservation to answer hypothetical questions, to answer the Eleventh Circuit in the context of a fully-developed adversary proceeding in a case in which a direct appeal to this Court lies.

As the three-judge panel emphasized in *Bradford v. State of Alabama, et al.*, CV-94-PT-2816-M (N.D. Ala.), November 25, 1994, for this Court or any court to now hold that the ballots that met the three-prong test of *Williams v. Lide* are not to be counted, would, in and of itself, work a change in Alabama law. As the record in *Odom* establishes without contradiction and as the Justice Department noted in its letter to the Attorney General of Alabama and of record before the panel of

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[12] Alabama has a Unified Judicial System. § 6.01, Art. 6, Amendment 328, Alabama Const. This Court has general supervision and control over all of the inferior courts in the state. § 6.02, Art. 6, Amendment 328, Ala. Const. 1901. The Montgomery County Courthouse is located less than a block from the Judicial Building in which this Court sits. In the Montgomery County Courthouse, there is a case ripe for adjudication. A direct appeal from a judgment in that case lies to this Court. A record has been developed in that case, and a motion for summary judgment has been filed. The record contains undisputed evidence that is material to this Court's ability to answer the question certified. We have directed the Clerk of the Montgomery County Circuit Court to certify the record in *Odom v. Bennett*, CV 94-2434, to this Court to aid us in answering the question certified.

U.S. district and circuit judges in *Bradford*, the actual practice and standards for accepting absentee ballots has varied considerably among Alabama's 67 counties, and the substantial compliance rule, or some variation of it, has been the rule in a number of Alabama counties for a considerable period.

The record in *Odom v. Bennett*, CV 94-2434, shows, without dispute, that absentee ballots, not in strict compliance with the witness requirements of § 17-10-7, were counted in some Alabama counties after the general election of November 8, 1994.[13] It is also undisputed that absentee ballots, legally and materially indistinguishable from those that were counted in some counties, were not counted in other counties.[14] Thus, a change to strict compliance would itself constitute a voting change with a potential for discrimination and would itself require Section 5 preclearance prior to any implementation by the state, notwithstanding the Code language.

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[13] In Covington County, 11 absentee ballots that lack a notary or two witnesses were counted; in Marion County, all 577 absentee ballots were counted, without examination. Former Secretary of State Billy Joe Camp, who trained poll workers and has had personal knowledge of absentee voting procedures for 25 years, stated that the general practice has been for absentee ballots to be counted if there was substantial compliance. Fred Posey, circuit clerk of Autauga County for 50 years, stated that it was his practice, as absentee ballot manager, to accept signed absentee ballots although the affidavit did not contain a notary or witness, unless he thought there was fraud involved. In Winston County, 81 absentee ballots were included in the county's official tally, although it was discovered that the ballots were notarized by someone whose commission had expired.

[14] In Sumter County, past election officials had used a substantial compliance test, but in the November 8th election, they switched to a strict compliance test. Based on her experience with past elections, the Circuit Clerk of Sumter County estimated that approximately 1,000 absentee ballots were cast. In Bullock County, 21 signed absentee ballots were rejected because of missing witness signatures.

The right to vote is precious to the citizens of Alabama, as it is to all citizens. As the United States Supreme Court stated in *Westberry v. Sanders,* 376 U.S. 1, 17, 84 S.Ct. 526, 535 (1964):

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, eevn the most basic, are illusory if the right to vote is undermined."

Therefore, the right of qualified citizens to vote in state and/or federal elections is protected under the Constitution of the United States. *Reynolds v. Sims,* 377 U.S. 533, 554, 84 S.Ct. 1362, 1377-78 (1964); The *Ku Klux Cases,* 110 U.S. 651, 4 S.Ct. 152 (1884); see also *Griffin v. Burns,* 570 F.2d 1065, 1077 (1st Cir. 1978). In *Reynolds v. Smis,* 377 U.S. 533, 84 S.Ct. 1362 (1964), the Supreme Court said, "[t]he right to vote freely for the candidate of one's choice is of the assence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds,* 377 U.S. at 555, 84 S.C.t at 1378.

The U.S. Supreme Court has determined that qualified voters, in addition to having a constitutionally protected right to vote, also have a concomitant right to have their votes counted. *U.S. v. Mosley,* 238 U.S. 383, 35 S.Ct. 904, 905 (1915); see also *U.S. v. Classic,* 313 U.S. 299, 315, 61 S.Ct. 1031, 1037 (1941); *Gamza v. Aguirre,* 619 F.2d 449, 452 (5th Cir. 1980). The Constitution protects these rights and nullifies any state law that denies these rights to its citizens. *Lane v. Wilson,* 307 U.S. 268, 275, 59 S.Ct. 872, 876 (1939).

Alabama state law governing absentee voting also reflects the public policy interest in allowing each qualified citizen the right to vote. The Alabama Supreme Court has joined a sizeable majority of jurisdictions in this country in holding that absentee voting laws should be liber-

ally construed, as opposed to strictly construed, to accomplish the purpose for which they were adopted: to protect and further a citizen's right to vote. *Wells v. Ellis,* supra. Alabama's law has long been that "a voter should not be disfranchised by a rejection of his ballot, in whole or in part, when it is clear that he made an honest effort to comply with the law and has substantially complied with its mandatory requirements." *Garrett v. Cuninghame,* 211 Ala. 430, 438, 100 So. 845, 853 (1924); *Campbell v. Jefferson County,* 216 Ala. 251, 251, 113 So. 230, 230 (1927) (citations omitted; emphasis added); see *Woodall v. City of Gadsden,* 278 Ala. 634, 636, 179 So.2d 759, 761 (1965); *Wells v. Ellis,* 551 So.2d 382 (Ala. 1989); *Williams v. Lide,* 628 So.2d 531, 536 (Ala. 1993).

However, the fact that Alabama law requires election officials to count absentee ballots that are in substantial compliance with § 17-10-7, Aia. Code 1975, does not mean that all such ballots are free to challenge and are not subject to a determination of their validity, once challenged in an election contest. In this instance, that determination will be made in the legislature, if a contest is filed there. A voter's ballot is not an invalid ballot simply because the voter did not show up at the polls but instead cast his vote by absentee ballot. A voter, voting by absentee ballot, is not required to establish his right to have his vote *counted* any more than a voter casting his vote in person at the polls is required to ensure that *his* vote is counted. As the United States Supreme Court stated in *U.S. v. Mosley,* 238 U.S. 383, 35 S.Ct. 904 (1915), "[t]he right to have one's vote counted is as open to protection . . . . as the right to put a ballot in a box." *Mosley,* 238 U.S. at 386, 35 S.Ct. at 905. Each individual is entitled to vote and to have his vote counted.

For over seventy years, decisions of this Court have consistently construed Alabama's election laws liberally, where possible, to permit Alabama citizens to express

their will at the polls. In 1924, the Alabama Supreme Court held that an election could not be voided if the manneor of conducting it substantially complied with the law. *Garrett v. Cuninghame,* 211 Ala. 430, 439, 100 So. 845, 853-54 (1924). *Garrett* involved an election contest between two Democratic candidates for probate judge of Clarke County, and whether the conduct of election officers, by requiring some voters to choose between (i) a ballot stamped with the addition of one of the candidates or (ii) an unstamped ballot, thus resulting in a public declaration of a voter's decision prior to obtaining a ballot, should be grounds for rejecting those votes. *Garrett,* 211 Ala. at 432, 439, 100 So. at 847, 854. This Court held that the conduct was a technicality that did not deny voters their right to freely choose the candidate of their choice. *Garrett,* 211 Ala. at 439, 100 So. at 854. As stated in *Garrett*:

> "While *before* an election all provisions of an election law are mandatory, if sought to be enforced, *after* an election is held they are held to be directory only, if this is possible. . . . It is, therefore, very generally held that provisions of a statute as to the manner of conducting the details of an election are not mandatory, but directory merely, and irregularities in conducting an election and counting the votes, not proceeding from any wrongful intent, and which deprive no legal voter of his vote, will not vitiate an election, or justify the rejection of the entire poll of a precinct."

Id. (citations omitted).

In 1933, this Court held that absentee ballots cast on imperfect absentee vote forms were in substantial compliance with the statutes and must be counted. *Pope v. Howle,* 227 Ala. 154, 157, 149 So. 222, 224-25 (1933). In *Pope,* two contestants claimed that twenty-one votes in a municipal election had been wrongfully rejected; thirteen were challenged ballots, and eight were absentee

ballots. *Pope,* 227 Ala. at 155, 156, 149 So. at 223. In an election contest, the trial court counted all twenty-one votes, and the election results were changed. An appeal followed, and this Court affirmed. *Id.* at 158. Regarding the counting of absentee ballots, the Court stated:

> "These eight votes were, however, counted for contestants as the legally expressed will of these voters. The fact that old or imperfect blanks were given such voters to execute will not here be permitted to change the result and to defeat the honest effort of these voters to discharge their high duty of citizenship."

Id. at 157.

In 1965, this Court allowed two votes to be counted in the context of an annexation election, even though the voters' witness was not a qualified elector, as required by the rules of the Board of Registrars of Etowah County. *Woodall v. City of Gadsden,* 278 Ala. 634, 636, 179 So.2d 759, 760 (1965). In quoting the "established law" of Alabama, this Court held that the substantial compliance standard applied to statutory mandates regarding voting was also the standard applicable to the rules of local Boards of Registrars. *Woodall,* 278 Ala. at 636, 179 So.2d at 761.

In addition, the rule of substantial compliance with voting laws is consistent with the intent of the legislature. The procedures for counting votes are provided in § 17-13-1 et seq., Ala. Code 1975. Section 17-3-2 of the Alabama Code provides that ballots, even when improperly marked, must be counted where it is possible to determine the voter's choice. The statute further states:

> "[N]or shall any ballot rejected for any technical error which does not make it impossible to determine the elector's choice, and nothing in the election law

> shall be construed so as to prevent any elector from voting for any qualified person other than those whose names are printed on the ballot."

Ala. Code 1975, § 17-13,2.

Alabama adopted its current statutory scheme authorizing voters to cast absentee ballots in 1975. Ala. Code 1975, § 17-10-1 et seq. Section 17-10-7, which requires an affidavit *substantially* in the form supplied by the statute, states, as a note, that the absentee voter's signature "must be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older." This statute was first addressed by this Court five years ago in *Wells v. Ellis*, 551 So.2d 382 (Ala. 1989).

In *Wells*, two unsuccessful candidates in a municipal election contested the election results, claiming that they were defeated because illegal absentee votes were counted.[15] *Wells*, 551 So.2d at 382. The losing candidates argued that the absentee votes did not comply with § 17-10-7 because the accompanying affidavits had one of the following problems: (1) defective signatures, either by the absentee voter or a witness; (2) no dates; or (3) lack of a reason for voting absentee. *Id.* The trial court held that the statute permitting absentee voting gave a statutory privilege and should be *strictly construed*. This Court reversed the judgment of the trial court and held that, in the absence of fraud, gross negligence, or intentional wrongdoing, absentee ballots in substantial compliance with essential requirements of the absentee voting law should be counted if the irregularities do not adversely affect the sanctity of the ballot and the integrity of the election. *Id.* at 384-85.

In *Wells*, the Court adopted the Florida Supreme Court's rationale in *Boardman v. Esteva*, 323 So.2d 259

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[15] The candidates also claimed they were defeated because legal votes were rejected, while others were miscalculated, and because of misconduct by some election officers.

(Fla. 1975), *cert. denied*, 425 U.S. 967, 96 S. Ct. 2162 (1976), which similarly construed Florida's absentee voting statute. In *Boardman*, the Florida Supreme Court held that its statute required only substantial compliance in order to have a valid absentee ballot and explained why this was so in the following language:

> " 'We first take note that the real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. Ours is a government of, by, and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.' "

Wells, 551 So.2d at 384 (quoting *Boardman*, 323 So.2d at 263). The *Boardman* Court refused to discount the cast absentee ballots because of a mere "technical violation of the law." *Wells*, 551 So.2d at 384 (citing *Boardman*, 323 So.2d at 263). *Wells* also adopted three factors listed in a 1984 Florida election dispute case, referred to by the Florida Supreme Court as the *"Boardman* factors," which must be met in order to satisfy a state's absentee voting requirement:

> " '(a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;

> " '(b) whether there has been *substantial compliance* with the essential requirements of the absentee voting law; and
>
> " '(c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.' "

Wells, 551 So.2d at 384 (quoting *Bolden v. Potter*, 452 So.2d 564, 566 (Fla. 1984) and citing *Boardman v. Esteva*, 323 So.2d 259, 263 (Fla. 1975), *cert. denied*, 425 U.S. 967, 96 S.Ct. 2162 (1976)) (emphasis added).

Since 1989, the Alabama Supreme Court has clearly stated that election officials are required to count absentee ballots if such ballots are in substantial compliance with the requirements of § 17-10-7. Ala. Code 1975. The language of § 17-10-7, which states that the "affidavit which shall be used in general, special or municipal elections shall be *substantially* as follows . . . ," also indicates that the legislature intended an affidavit substantially in compliance with the statutory form. Ala. Code 1975, § 17-10-7 (emphasis added). Under Alabama law, the ballots of an entire voting block may not be summarily rejected by those charged with administering the election laws because of a technical failure to follow exactly the affidavit supplied in § 17-10-7.

As recently as 1993, in *Williams v. Lide*, 628 So.2d 531 (Ala. 1993), this Court reaffirmed Alabama's law with regard to the duty of election officials to count absentee ballots and the authority of a trial court in an election contest to reject ballots that are not shown to be valid ballots once challenged. Like the *Wells* case, *Williams* also involved a local election contest between two candidates, who were competing for the Dallas County Commission district 2. *Williams*, 628 So.2d at 533. The losing candidate, John L. Lide, alleged that many of the cast votes were illegal for a variety of reasons. Contests of these elections, are, by statute, heard by Circuit Courts. Ala. Code 1975, § 17-15-29. The court agreed with Lide

and entered judgment for him because he had received the most legal votes, but Williams appealed, as the victor in the original vote count.

The first issue on appeal in *Williams* involved a convicted felon's right to vote. According to Alabama's Constitution of 1901, Art. VIII, § 182, a person who has been convicted of a felony and has not been pardoned is disfranchised. See also, Ala. Code 1975, § 17-3-10. Lide proved that eight persons who voted in the election had been convicted of a felony and had not been pardoned. *Williams*, 628 So.2d at 533. The trial court held that the votes of each of these eight persons must be rejected, and this Court affirmed that holding.[16]

Second, the votes of 71 people who presented themselves to vote at the polling places were challenged as permitted by § 17-4-127.[17] These voters cast challenged ballots after executing an oath administered by an election inspector, as provided by § 17-12-3. These votes were received and *counted* as required by Alabama law. *Williams*, 628 So.2d at 534 (citing *Hawkins v. Persons*, 484 So.2d 1072, 1073 (Ala. 1986)). The challenged voters were allowed to testify at trial to explain any problems in their challenged ballots. After considering each challenged vote, the trial court held some of the challenged votes were illegal and rejected them, while others were held to be legal votes and were acceptd by the trial court. This Court affirmed.

The third issue involved whether certain absentee ballots were erroneously rejected by election officials because

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[16] Justices Maddox and Adams dissented from this holding, saying that, in their opinion, convicted felons should be permitted to vote until their names are formally removed from the list of qualified voters.

[17] According to Ala. Code 1975, § 17-4-127, a person whose name does not appear on the voting list shall not be allowed to vote unless the person: (i) votes a challenged ballot or (ii) presents a certificate from the Board of Registrars. See *Williams*, 628 So.2d at 534.

of alleged deficiencies. *Williams,* 628 So.2d at 536. At trial, Williams argued that thirteen of the absentee ballots were improperly rejected by officials. *Id.* The trial court reviewed each absentee ballot and by its accompanying affidavit to determine if each ballot substantially complied with § 17-10-7 and the three *Boardman* factors set forth in *Wells v. Ellis,* supra. The *Williams* Court then stated:

> "Although *Wells* stands for the proposition that an absentee voter's affidavit need not be identical to the form contained in § 17-10-7, under *Wells* the affidavit must comply substantially with § 17-10-7 and its irregularities must now 'adversely affect the sanctity of the ballot and the integrity of the election.' To fulfill these requirements from *Wells, the trial court admitted into evidence only those absentee ballots that were accompanied by an affidavit containing the voter's (1) place of residence, (2) reason for voting absentee, and (3) signature.* However, if an absentee voter's affidavit lacked any of those three elements, the trial court permitted the voter to testify at trial to supply the missing elements."

Id. (emphasis added).

After examining the thirteen absentee ballots and affidavits in accordance with the aforementioned standards, the trial court found that seven of them met its "three-element test" (residence, reason, and signature) and were legal votes that must be counted. *Id.* None of these seven ballots were notarized, and six of them were not witnessed at all, while the remaining ballot had been witnessed by only one witness.

Of the remaining six ballots that did not meet the three-element test, four ballots did not exhibit a signature, and two ballots did not exhibit an address. At trial, the court took testimony as to the four ballots without signatures, finding that two of the ballots were cured by testimony, and two were not. *Id.* The trial court refused

to allow testimony as to the two ballots without an address, and they were not counted. *Id.* Thus, the trial court held that nine of the thirteen absentee ballots were legal and valid. This Court affirmed.

This Court, in *Williams,* reaffirmed the *Boardman* factors that had originally been adopted in *Wells,* supra, which provide the three requirements for determining whether an absentee vote complies with § 17-10-7. This Court stated the factors as follows:

> "(a) that the voter was not guilty of 'fraud, gross negligence, or intentional wrongdoing';
>
> "(b) that the voter substantially complied 'with the essential requirements of the absentee voting law'; and
>
> "(c) that any irregularities in the vote do not 'adversely affect the sanctity of the ballot and the integrity of the election.' "

Williams, 628 So.2d at 536 (citing 551 So.2d at 384 (quoting *Bolden v. Potter,* 452 So.2d 564, 566 (Fla. 1984) and citing *Boardman v. Esteva,* 323 So.2d 259, 263 (Fla. 1975), *cert. denied,* 425 U.S. 967, 96 S.Ct. 2162 (1976))).

In *Williams,* however, this Court, in adopting the trial court's three-element test, further provided that absentee ballots with "an affidavit containing the voter's (1) place of residence, (2) reason for voting absentee, and (3) signature" meet the *Boardman* factors for substantial compliance and must be counted. *Id.* This Court stated:

> "[W]e conclude that the three-element test devised by the trial court was the most lenient test it could have used under the circumstances, to determine whether affidavits were in substantial compliance with § 17-10-7 and whether any irregularities in them would 'adversely affect the sanctity of the ballot [or] the integrity of the election.' . . . Had the trial court

> been any more lenient, it would have effectively abolished § 17-10-7 and, necessarily, would have compromised the integrity of the election process."

Id. at 537.

The public policy favoring the right to vote and to have one's vote counted and the public policy against disfranchising voters require only residence, reason, and signature to establish the validity of a ballot for the purpose of having that ballot counted. Such ballots, like all others, are of course subject to being challenged in an election contest. If any ballots are shown to be fraudulent in the context of a contest, they should be rejected. No evidence of fraud, gross negligence, or intentional wrongdoing has been shown in this case, nor has it been shown that any irregularities in the uncounted absentee ballots affect the sanctity of those ballots or the integrity of the election.

Finally, Alabama is not alone in applying the substantial compliance standard to voting laws. A majority of jurisdictions follow the same or a similar standard.[18] Although states interpret "substantial compliance" differently, many using a less stringent test than the three-element test (residence, reason, and signature) pronounced in *Williams v. Lide,* supra, most of them adhere to the importance of a citizen's right to vote and to have that vote counted, as opposed to concentrating on a technical violation of the law as a basis for disfranchising certain qualified voters.

For example, as mentioned earlier, Florida adopted the substantial compliance standard for absentee voting laws in *Boardman v. Esteva,* 323 So.2d 259 (Fla. 1975), *cert. denied,* 425 U.S. 967, 96 S.Ct. 2162 (1976), upon which Alabama relied in *Wells v. Ellis,* 551 So.2d 382 (Ala. 1989). In its rationale, the Florida Supreme Court stated:

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[18] See Appendix A for Majority Jurisdictional Survey.

> "In developing a rule regarding how far irregularities in absentee ballots will affect the result of the election, *a fundamental inquiry should be whether or not the irregularity complained of has prevented a full, fair and free expression of the public will.* Unless the absentee voting laws which have been violated in the casting of the vote expressly declare that the particular act is essential to the validity of the ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as directory, not mandatory, *provided such irregularity is not calculated to affect the integrity of the ballot or election.*"

Boardman, 323 So.2d at 265.

The Colorado Supreme Court also relied on *Boardman* in adopting its rule of substantial compliance. *Erickson v. Blair,* 670 P.2d 749, 755 (Colo. 1983). In *Erickson,* the election dispute over a seat on the Avon Metropolitan Board of Directors involved the improperly completed affidavits on the return envelopes of seven absentee ballots, including one with no address on the affidavit, and one that failed to include the voter's signature on the affidavit. *Erickson,* 670 P.2d at 751-52. While the trial court rejected the seven votes for failure to strictly comply with the statutory affidavit form, the Colorado Supreme Court, in reversing the decision and adopting substantial compliance, stated:

> "We believe the time has come to interpret absentee voting legislation in light of the realities of modern life and the fundamental character of the right of suffrage. We live in a society which, to a great extent, depends upon mobility as an indispensable condition of progress. Many persons for legitimate reasons cannot be physically present at a polling place to cast their ballots on the day of the election. These electors, no less than in-person voters, should be able to present their views on issues of public

> importance without being encumbered by an unyielding standard of statutory exactitude. Moreover, the right to vote is a fundamental right of first order. Absentee voting legislation should not be construed in a manner that unduly interferes with the exercise of this right by those otherwise qualified to vote. Nor should the exercise of the voting right be conditioned upon compliance with a degree of precision that in many cases may be a source of more confusion than enlightenment to interested voters. A rule of strict compliance, especially in the absence of any showing of fraud, undue influence, or intentional wrongdoing, results in the needless disenfranchisement of absent voters for unintended and insubstantial irregularities without any demonstrable social benefit."

Id. at 754-55 (citations omitted).

According to Kentucky law, the omission by notaries public of the county and state in which they are commissioned is not sufficient grounds to reject absentee ballots, even though the missing information results in the notarization being void. *Harmon v. Wilson,* 254 S.W.2d 693, 694 (Ky. 1953).

Furthermore, while a minority of jurisdictions follow the strict compliance standard,[19] compliance with these statutes is less stringent than residence, reason, *and* signature.

Conclusion

When all the rhetoric is stripped away, the federal courts have interrupted the state courts' determination of whether all the legal votes cast by Alabama citizens in the November 8th general election have been counted. Unless those absentee ballots that substantially comply with the law are counted, the voters have been disfranchised. The due process clause of the Alabama Constitution and cumulative clauses, read together, guaran-

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[19] See Appendix B for Minority Jurisdictional Survey.

teeing equal protection of the laws, Ala. Constitution of 1901, Art. I, §§ 1, 6, and 22, compel, as an answer to the question certified, that the absentee ballots in substantial compliance with the law are due to be counted.

We therefore answer the certified question from the Eleventh Circuit to this Court as follows: Absent a showing of fraud, gross negligence, or intentional wrongdoing, Alabama law requires the counting of all absentee ballots cast in the general election of November 8, 1994, which contain: (1) the place of residence of the person casting the ballot; (2) the reason for voting by absentee ballot; and (3) the signature of the voter. The appropriate place to make any such showing would be in the Legislature if a challenge is filed. Thus, any such absentee ballots at issue are to be opened, over challenges if made, and counted.

The appellees' motion for disqualification of Justices and appointment of a special court is denied by separate order attached as Appendix C. A certified copy of the record in *Odom v. Bennett* is to be forwarded to the Eleventh Circuit Court of Appeals as an integral part of this answer to the certified question.

QUESTION ANSWERED.

Almon, Shores, Ingram, and Cook, JJ., concur.

Maddox, J., dissents. Dissent to follow.

Hornsby, C.J., recused.

Houston, J., recused (with statement indicating reasons for recusal).

APPENDIX A

MAJORITY SURVEY

Ala. Code § 17-10-7 (1987); *Wells v. Ellis,* 551 So.2d 382 (Ala. 1989); *Williams v. Lide,* 628 So.2d 531 (Ala. 1993);

Ariz. Rev. Stat. Ann. §§ 16-544, 547, 548 (1984 & Supp. 1994) (no notarization or attestation is required, but §§ 16-550, 552 require two-tier signature comparisons); Az. Op. Atty. Gen. No. 179-248 (Oct. 4, 1979) (states that previous Arizona case law requires only substantial compliance with election requirements);

Ark. Code Ann. § 7-5-409 (Michie 1993) (no notarization or attestation is required); *Forrest v. Baker,* 287 Ark. 239, 698 S.W.2d 497 (1985) (holding that "out of town" as a reason for seeking an absentee ballot is substantial compliance with the statute requiring a reason to be given);

Cal. Elec. Code § 3011 (West 1995) (no notarization or attestation is required, but §§ 3009(a), 3019 require two-tier signature comparisons); *Wilks v. Mouton,* 42 Cal.3d 400, 722 P.2d 187, 229 Cal.Rptr. 1 (1986), *cert. denied,* 479 U.S. 1066, 107 S.Ct. 953 (1987) ("Non-compliance with the directory provisions of the Elections Code will not nullify a vote." . . . While the legislature the following year added the word "mandatory" to the statutes, subsequent case law has followed a substantial compliance standard.);

Colo. Rev. Stat. Ann. §§ 1-8-114, 1-8-115 (West 1980 & Supp. 1994) (no notarization or attestation is required); *Erickson v. Blair,* 670 P.2d 749 (Colo. 1983) (rejects the rule of strict compliance and adopts a standard of substantial compliance which "is adequate to the task of both preventing fraud in elections and preserving the absent voter's right of suffrage against unnecessary and technical restrictions");

Conn. Gen. Stat. Ann. §§ 9-137, 9-139 (West 1995) (no notarization or attestation is required, but § 9-140 requires that absentee ballot may only be mailed to the voter's personal address); *Gargona v. Downey,* 30 Conn. Supp. 254, 309 A.2d 347 (1973) (holding that Connecticut follows the substantial compliance standard);

Fla Stat. Ann. §§ 101.64, 101.65 (West 1992) (absentee voter must sign envelope and must be witnessed by two persons); *Boardman v. Esteva,* 323 So.2d 259 (Fla. 1975), *cert. denied,* 425 U.S. 967, 96 S.Ct. 2162 (1976) (This case applied the substantial compliance standard to Florida's absentee voting laws. In this case, some electors had failed to sign their ballots, but since their names were written somewhere on their ballots and witnesses had signed them, the Court allowed the ballots to be counted even though they did not technically comply with the statutes.); *McLean v. Bellamy,* 437 So.2d 737 (Fla. Dist. Ct. App. 1983) (stating that witness requirements were directory and not mandatory); *Bolden v. Potter,* 452 So.2d 564 (Fla. 1984) ("We reiterate our previous statement that courts must not interfere with an election process when the will of the people is unaffected by the wrongful conduct.");

Ga. Code Ann. §§ 21-2-381, 21-2-384, 21-2-386 (Michie 1993) (No notarization or attestation is required, unless the elector needs assistance, but there is a one-tier signature comparison, and the ballots may only be mailed to the voter's permanent mailing address.);

Haw. Rev. Stat. § 15-6 (1985) (no notarization or attestation is required, but § 15-9 requires a one-tier signature comparison); *Thirty Voters of Kauai County v. Doi,* 61 Haw. 179, 599 P.2d 286 (1979) (applying substantial compliance to Hawaii's general election laws);

Idaho Code § 34-1004 (1981) (no notarization or attestation is required, but § 34-1008 requires a one-tier signature comparison); *McCall v. Martin,* 74 Idaho 277,

262 P.2d 787 (1953) ("[W]hen a ballot is sufficiently plain to gather therefrom a part of the voter's intention, it should be the duty of the judges to count such part." (citing Idaho Code § 34-1202 (1891));

Ill. Ann. Stat. ch. 10, para. 5/19-5, 5/19-9 (Smith-Hurd 1993) (Under Illinois law, no notarization or attestation is required, but the statute requires a one-tier signature comparison. The statute states "must substantially follow this form."); *Craig v. Peterson*, 39 Ill.2d 191, 233 N.E.2d 345 (1968) (holding that substantial compliance with statutory requirement of initialing of ballots was directory rather than mandatory in absentee ballot situation); *Bazydlo v. Volant*, 264 Ill.App.3d 105, 636 N.E.2d 1107 (1994), *aff'd*, 1995 WL 65477 (Feb. 17, 1995); *Pullen v. Mulligan*, 138 Ill.2d 21, 561 N.E.2d 585 (1990) ("Literal compliance with directory provisions will not be required if it appears that the spirit of the law has not been violated and the result of the election has been fairly ascertained.");

Ind. Code Ann. §§ 3-11-4-21, 3-11-10-4 (Burns 1993 & Supp. 1994) (no notarization or attestation is required, but there is a one-tier signature comparison);

Iowa Code Ann. § 53.16 (West 1995) (no notarization or attestation is required) *Lee v. Rand*, 299 N.W.2d 486 (Iowa 1980) (applying substantial compliance to Iowa's election laws);

Kan. Stat. Ann. § 25-1124 (1993) (no notarization or attestation is required); *Willmeth v. Harris*, 195 Kan. 322, 403 P.2d 973 (1965) (applying substantial compliance standard); *Hansen v. Lindley*, 152 Kan. 63, 102 P.2d 1058 (1940) (minor discrepancies in notarization did not affect the validity of the absentee ballots);

Ky. Rev. Stat. Ann. § 117.086 (Baldwin 1993) (no notarization or attestation is required); *Rives v. Pettit*, 513 S.W.2d 475 (Ky. Ct. App. 1974) (stating that absentee ballots did not have to be eliminated because

of the irregular manner in which they were handled and counted);

La. Rev. Stat. Ann. § 18:1310 (West 1979 & Supp. 1995) (absentee ballot must be notarized or attested by two witnesses); *Brunet v. Evangeline Parish Bd. of Supervisors of Elections*, 379 So.2d 271 (La. Ct. App. 1979) (A recount of absentee ballots conducted prior to the removal of a restraining order constituted substantial compliance with absentee voting laws.);

Me. Rev. Stat. Ann. tit. 21-A, §§ 754-A(1)(c), 754-A(3) (West 1993) (no notarization or attestation is required, unless the elector needs assistance, but § 756(2) requires a one-tier signature comparison); *Kelly v. Curtis*, 287 A.2d 426 (Me. 1972) (stating that Maine generally uses a "liberal construction" standard to determine the meaning of the constitutional provisions that relate to the holding of special elections for the enactment or rejection at the polls of measures initiated by the people);

Md. Elec. Code Ann. Art. 33 §§ 27-4, 27-9 (1993) (no notarization or attestation is required);

Mass. Gen. Laws Ann. ch. 54, §§ 87, 92, 97 (West 1990 & Supp. 1994) (no notarization or attestation is required, but §§ 91, 94 require a one-tier signature comparison); *Colten v. City of Haverhill*, 409 Mass. 55, 564 N.E.2d 987 (1991) (applying substantial compliance to allow votes that lacked addresses and reasons for voting absentee); *Connolly v. Secretary of Commonwealth*, 404 Mass. 556, 536 N.E.2d 1058 (1989) (This case applied substantial compliance to allow unwitnessed votes to be counted. The witness lines of the absentee ballot affidavit forms had erroneously been omitted, but because of other adequate safeguards such as the elector's address, place of voting, the date the ballot was mailed, and an affidavit signed by the elector, the votes were counted.);

Mich. Comp. Laws Ann. §§ 168.764, 168.764A, 168.766 (West 1989 & Supp. 1994) (no notarization or

attestation is required, but there is a one-tier signature comparison); *Andrews v. Branigin*, 21 Mich. App. 568, 175 N.W.2d 839 (1970) (This case applied a substantial compliance standard to Michigan election laws. "The general intent of the act as a whole must be considered; effectuation of the purpose of a statute should if possible prevail over its strict letter when construing the statute.");

Minn. Stat. Ann. §§ 203B.07(2), 203B.21 (West 1994) (absentee ballot must be notarized or witnessed); *Matter of Contest of School Dist. Election Held on May 17, 1988*, 431 N.W.2d 911 (Minn. Ct. App. 1988) ("Election resulting in fair and free expression of will of legal voters will not be invalidated because of departure from statutory regulations governing conduct of election, except in those cases where legislature has clearly and unequivocally expressed intent that specific statutory provision is essential jurisdictional prerequisite.");

Mo. Ann. Stat. § 115.291 (Vernon 1994) (absentee ballot must be notarized); *Application of Lawrence*, 353 Mo. 1028, 185 S.W.2d 818 (1945) ("Election laws must be liberally construed in aid of the right of suffrage.");

Mont. Code Ann. §§ 13-13-221, 13-13-241 (1993) (no notarization or attestation is required, but § 13-13-213(1) requires two-tier signature comparison); *Maddox v. Board of State Canvassers*, 116 Mont. 217, 149 P.2d 112 (1944) (applying a substantial standard to Montana election laws; concerned voting compliance by those in the military);

Nev. Rev. Stat. § 293.330 (1995) (no notarization or attestation is required, but § 293.325 requires one-tier signature comparison);

N.H. Rev. Stat. Ann. §§ 657:17, 657:20 (1986 & Supp. 1994) (no notarization or attestation is required, but § 659:50 requires one-tier signature comparison);

N.J. Stat. Ann. §§ 19:57-16, 19:57-17, 19:57-23, 19:57-24 (West 1989 & Supp. 1994) (no notarization or attestation is required, unless the elector needs assistance, but there is a one-tier signature comparison); *Petition of Livingston*, 83 N.J. Super. 98, 199 A.2d 37 (1964), *cert. denied, Livingston v. O'Donnell*, 42 N.J. 420, 201 A.2d 62 (1964) (In this case, a candidate notarized absentee ballots, and the court stated that absent any showing of fraud, there is no reason to disfranchise those voters because the New Jersey legislature has provided that absentee voting laws should be liberally construed.);

N.M. Stat. Ann. § 1-6-9 (Michie Supp. 1994) (no notarization or attestation is required); *Kiehne v. Atwood*, 93 N.M. 657, 604 P.2d 123 (1979) (rejected seven absentee votes not notarized in the presence of the elector);

N.Y. Elec. Law §§ 7-122, 8-410 (McKinney 1978 & Supp. 1995 (no notarization or attestation is required, but § 9-104 requires one-tier signature comparison); *St. John v. Board of Elections of County of Albany*, 546 N.Y.S.2d 301 (N.Y. Sup. Ct. 1989) (indicating that New York applies a substantial standard in applying election laws); *Application of Egan*, 511 N.Y.S.2d 465 (N.Y. Sup. Ct. 1986) (The court held that no date was needed on the absentee ballot in order to substantially comply. "The right of the voter to be safeguarded against disfranchisement and to have his intent implemented . . . . transcends technical errors.");

N.C. Gen. Stat. §§ 163-227, 163-229 (1994) (absentee ballot must be witnessed by two persons);

N.D. Cent. Code § 16.1-07-08 (1991 & Supp. 1993) (no notarization or attestation is required, but § 16.1-07-12 requires one-tier signature comparison); *Mittelstadt v. Bender*, 210 N.W.2d 89 (N.D. 1973) (This case applied a substantial compliance standard in an absentee ballot case. "Our statutes are to be liberally construed to effect their objects and promote justice."); but cf.

Kuhn v. Beede, 249 N.W.2d 230 (N.D. 1976) (A statutory provision that absentee ballots must be endorsed with an official stamp and the initials of election official was held mandatory.);

Ohio Rev. Code Ann. §§ 3509.04, 3509.05 (Baldwin 1988 & Supp. 1993) (no notarization or attestation is required, but § 3509.06 requires one-tier signature comparison); *Martin v. Porter*, 353 N.E.2d 919 (Ohio Com. Pl. 1976) ("All provisions of election laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview; however, irregularities which are not caused by fraud and which do not interfere with a full and fair expression of the voter's choice should not effect a disfranchisement of the voters.");

Okla. Stat. tit. 14, §§ 107-08 (1991) (voter's affidavit must be notarized);

Or. Rev. Stat. § 253.065 (1986) (no notarization or attestation is required, but § 253.080 requires one-tier signature comparison);

Pa. Stat. Ann. tit. 25, § 3146.6 (1994) (no notarization or attestation is required, unless the elector needs assistance);

R.I. Gen. Laws § 17-20-21 (1988 & Supp. 1994) (absentee ballot must notarized or attested by two witnesses); § 17-20-26 requires statute to be liberally construed. *Ball v. Board of Elections*, 102 R.I. 227, 229 A.2d 617 (1967) (applying a substantial compliance standard for Rhode Island's general election laws);

S.C. Code Ann. §§ 7-15-380, 7-15- 835 (Law Co-op. Supp. 1993) (absentee ballot must be witnessed); *Knight v. State Bd. of Canvassers*, 297 S.C. 55, 374 S.E.2d 685 (1988) (liberally construing South Carolina absentee voting laws and allowing absentee ballots that did not comply with technical statutory requirements to

be counted); but cf. *Gregory v. South Carolina Democratic Executive Comm.*, 271 S.C. 364, 247 S.E.2d 439 (1978) (The court declined to count unwitnessed ballots, although South Carolina's absentee voting statute is stricter than Alabama's statute. Specifically, according to South Carolina law, "no ballot shall be counted unless the oath is properly signed and enclosed therewith. . . .");

Tex. Elec. Code Ann. §§ 86.005, 87.041 (1986 & Supp. 1995) (no notarization or attestation is required, but there is a one-tier signature comparison); *Fugate v. Johnson*, 251 S.W.2d 792 (Tex. Ct. App. 1952) (An election contestant challenged 58 absentee votes for reasons such as nonresidence, below voting age, alienage, etc., but the court said it would not use the Election Code as "an instrument for disfranchisement for irregularities of procedure."); *Lee v. Whitehead*, 182 S.W.2d 744 (Tex. Ct. App. 1944) (An absentee ballot unaccompanied by an application or an affidavit was still counted because these statutory requirements were directory and partly because the mistake was due to an election official.); *Alvarez v. Espinoza*, 844 S.W.2d 238 (Tex. Ct. App. 1992); *Garza v. Salinas*, 434 S.W.2d 153 (Tex. Civ. App. 1968) (Both of these cases rejected ballots because of inadequate signature comparisons. In *Garza*, the court suspected that the votes were cast illegally.);

Utah Code Ann. §§ 20A-3-305, 20A-3-308 (Supp. 1994) (no notarization or attestation is required, but there is a one-tier signature comparison);

Vt. Stat. Ann. tit. 17, § 2540-42 (1982 & Supp. 1994) (no notarization or attestation is required); *Conn. v. Town of Brattleboro*, 120 Vt. 315, 140 A.2d 6 (1958) (This case applied a substantial compliance standard in upholding a municipal election, even though the defective notice of the election was a deviation from the exact statutory language.);

Wash. Rev. Code Ann. § 29.26.045 (West 1994) (no notarization or attestation is required, but § 29.36.060 requires one-tier signature comparison);

W. Va. Code §§ 3-3-1, 3-3-5, 3-4A-21 (1994) (no notarization or attestation is required, but absentee voters must generally vote in person in the Clerk of the Circuit Court's office); *State ex rel. Heavener v. Perry*, 155 W.Va. 353, 184 S.E.2d 136 (1971) ("The failure of a voter to perform an act prescribed by an election statute will not deprive him of the privilege of voting unless the statute plainly and clearly, by express provision or necessary implication, requires that result."); *State ex rel. McKown v. Board of Canvassers of Berkeley County*, 113 W.Va. 498, 168 S.E. 793 (1933); ("The intention of the voter, when ascertainable, is 'the guiding star' in ascertaining for whom a ballot shall be counted.");

Wis. Stat. Ann. § 6.87 (West 1991-92) (absentee ballot must be notarized or attested by two witnesses); *Matter of Hayden*, 105 Wis.2d 468, 313 N.W.2d 869 (1981) (Substantial compliance with delivery of the ballots was acceptable, as was a delayed addition of a date by a notary. "Strict compliance with a directory statute is not required."); *Lanser v. Koconis*, 62 Wis.2d 86, 214 N.W.2d 425 (1974).

APPENDIX B

MINORITY SURVEY

Alaska Stat. § 15.20.081 (1988 & Supp. 1994) (absentee ballot must be notarized or attested by two witnesses); *Finkelstein v. Stout*, 774 P.2d 786 (Alaska 1989) (This case required, in a 3-2 decision, strict compliance with the statute, however, the State argued for substantial compliance. The dissent stated it would not penalize absentee voters because election officials did not furnish unambiguous instructions.);

Del. Code Ann. tit. 15 §§ 5506, 5509 (1993) (While no notarization or attestation is required, signatures are compared. The voter must only sign a self-administered affidavit on the mailing envelope.);

Miss. Code Ann. § 23-15-631 (1990) (absentee ballot must be witnessed by the county registrar) (Section 23-15-635 uses the statutory language "shall"; Alabama's statute uses the language "substantially."); *Fouche v. Ragland*, 424 So.2d 559 (1982) (The court stated that a notary's signature could not also duplicate and serve as a witness' signature because, according to Mississippi statute, "a [absentee] ballot should be rejected if there is a defect in the execution of the outside of the envelope containing an absentee ballot. . . ."); but cf. *Walker v. Smith*, 213 Miss. 255, 56 So.2d 84 (1952) ("[T]he legislature was endeavoring to provide means for absent voters to exercise their right of suffrage. The result, therefore, ought not to be lightly tossed aside, unless the irregularity has prevented a full, fair and free expression of the public will. Especially is this true when the special tribunal found as a fact that there was no fraud or intentional wrongdoing in this regard.");

Neb. Rev. Stat. § 32-835, 32-841 (1993) (no notarization or attestation is required, but § 32-841 requires one-tier signature comparison); *McMaster v. Wilkinson*, 145

Neb. 39, 15 N.W.2d 348 (1944) (Absentee ballots on which there are "but formal mistakes, perhaps a mere clerical and careless error, while the essential facts required by law can still be ascertained" were counted, although the court pointed out that absentee voting laws have generally received strict construction.);

S.D. Codified Laws Ann. §§ 12-19-4,7 (1982 & Supp. 1994) (no notarization or attestation is required, but § 12-19-10 requires one-tier signature comparison); *Brown v. Dakota Pub. Serv. Co.*, 68 S.D. 169, 299 N.W. 569 (1941) (Absentee voters "should be required to strictly comply with the requirements of the statute in order to prevent fraud and preserve the purity and integrity of elections.");

Tenn. Code Ann. §§ 2-6-101 to 2-6-503 (1994) (notarization is required, as well as a one-tier signature comparison); (Section 2-6-101(c) states that "[t]o prevent fraud in an election, strict compliance with the provisions of this chapter is required."); *Lanier v. Revell*, 605 S.W.2d 821 (Tenn. 1980) (holding that, prior to the above-enacted statute, although substantial compliance applied with respect to Tennessee election laws, a strict compliance standard applied to absentee voting laws); *Payne v. Ramsey*, 591 S.W.2d 434 (Tenn. 1979) (stating that improperly executed affidavits were reason to reject absentee ballots); but cf. *Lanier*, supra, which also stated that a mere technical violation on the part of a deputy registrar would not cause a ballot to be rejected; *Foust v. May*, 660 S.W.2d 487 (Tenn. 1983) (registrar's failure to certify that signature comparisons were done does not cause ballots to be rejected);

Va. Code Ann. § 24.2-707 (Michie 1993) (Absentee ballot must be witnessed.); (Section 24.2-707 states that "[f]ailure to follow the procedures set forth above shall render the applicant's ballot void.");

Wyo. Stat. § 22-9-110 to 113 (1992) (no notarization or attestation is required); *Fugate v. Mayor and City Council of Town of Buffalo*, 348 P.2d 76 (Wyo. 1959) ("The right of absentee and disabled voters to cast their ballot at an election is purely statutory" and "will be strictly construed.").

APPENDIX C

IN THE SUPREME COURT OF ALABAMA
March 14, 1995

1940461

LARRY ROE, *et al.*

v.

MOBILE COUNTY APPOINTMENT BOARD, *et al.*
(CV-94-7138)

LARRY ROE, *et al.*

v.

STATE OF ALABAMA, by and through its
Attorney General, JEFF SESSIONS, *et al.*
(CV-94-7155)

MOTION FOR DISQUALIFICATION OF JUSTICES AND APPOINTMENT OF SPECIAL COURT

ORDER

The appellees' motion for disqualification of Justices and appointment of special court is denied.

The objection to members of this Court deciding this question by the *Roe* plaintiffs/appellees to this litigation comes too late. The alleged disqualification of the members of this Court to sit should have been raised in the Eleventh Circuit. It was that Court which certified the question to this Court, and all parties here were parties to the proceeding in which the question was certified. If any party had any objection to a member of this Court sitting on the certified question, he should have raised it

by objecting to the certification of the question to this Court.

Attorneys are officers of the courts before whom they practice. The attorneys for the *Roe* plaintiffs/appellees had an affirmative duty to disclose any matter that would affect the integrity of the proceedings. For these attorneys to fail to object before the United States Circuit Court for the Eleventh Circuit had certified what it held to be a determinative question of state law to this Court; to ask that the briefing time be shortened and the appeal expedited; to permit the full briefing cycle to run; to wait until the case was ready for decision; and then, when the decision of this Court was in draft form and was literally ready for release within days, to raise matters which have been public knowledge for months as grounds for recusal, approaches unacceptable conduct. It is certainly conduct indicating a lack of understanding of a lawyer's responsibility as an officer of this Court and of the Eleventh Circuit Court of Appeals, if not indicating an outright disrespect for both Courts.

Whether a judge or justice can fairly decide a case without bias or prejudice to either side is a matter confided to the conscience of each individual judge or justice. Although the method of electing judges by partisan popular elections is an imperfect one, it is the one the people of Alabama have selected. The fact that a member of this Court made a campaign contribution in a judicial election campaign to another member of this Court standing for re-election in no way suggests that either Justice is incapable of rendering a fair decision on the legal question before this Court regarding absentee ballots. A judge has a duty, in the absence of bias or prejudice, to hear a case to conclusion, and he should not avoid sitting on difficult or controversial cases in the absence of disqualification.

It is the general rule in Alabama that there is a presumption that a judge is qualified and unbiased, and a person who alleges otherwise has the burden of proving

the grounds for this allegation. *McMurphy v. State*, 455 So.2d 924, 929 (Ala. Crim. App. 1984). Prejudice on the part of a judge is not presumed. " 'The law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea.' " *Ex parte Balogun*, 516 So. 2d 606, 609 (Ala. 1987) (quoting *Fulton v. Longshore*, 156 Ala. 611, 46 So. 989 (1908)).

There are no stattuory grounds that would disqualify the challenged Justices, nor are there grounds that would require us to recuse ourselves. There are no indictments or inquiries pending that would trigger Amendment 328, § 6.19, Ala. Const. 1901. No Justice ruled on this case below, so § 12-1-13, Ala. Code 1975, does not apply. No Justice is related to any of the parties by kinship or affinity, and no Justice has represented any of the parties as their attorney, so no ground for recusal based on relationship or legal representation exists.

The movants rely on the general language recited in Canon 3(c)(1), Canons of Judicial Ethics, which requires a judge to disqualify himself in a proceeding in which "his impartiality might reasonably be questioned." They question the impartiality of Justices Shores, Almon, and Ingram on the grounds that these Justices made campaign contributions to the campaign of Chief Justice Hornsby. They question the impartiality of Justices Kennedy, Cook, and Butts because they were candidates who, the movants assert, received campaign contributions from attorneys who represent the Davis class.

The movants cite the Court to Canon 7(A)(1), Canons of Judicial Ethics, concerning political conduct of judges. The movants neglect to note, however, that this Canon recognizes that in a system in which judges are elected by the people, judges are not expected to be entirely isolated from political involvement:

> "A. Political Conduct in General.
>
> "1. . . . It is desirable that a judge or a candidate for election to judicial office endeavor not to be involved in the internal workings of political organizations, engage in campaign activities in connection with a political candidate other than candidates for judicial offices and not be involved in political fund solicitations other than for himself. However, so long as judges are subject to nomination and election as candidates of a political party, it is realized that a judge or a candidate for election to a judicial office cannot divorce himself completely from political organizations and campaign activities which, indirectly or directly, may be involved in his election or re-election."

Rule 7(A)(1), Canons of Judicial Ethics. This Canon is not authority for the proposition that a $500 contribution from a judge to judicial candidates requires recusal of the contributing judge.[20]

In Texas, where judges must also stand for election, "Texas courts have repeatedly rejected the argument that campaign contributions might create a bias to prompt recusal." *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 107 (Tex. App. 1990); *River Road Neighborhood Ass'n v. South Texas Sports, Inc.*, 673 S.W.2d 952 (Tex. App. 1984). The reasoning of the Texas courts is stated in *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. App. 1983):

> "Under our system, which requires that candidates for judicial office stand for election, it is necessary, unfortunately, that candidates for judicial office seek contributions for the purpose of defraying all or part of the expenses of what is, in reality, a political cam-

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[20] The fact that Justice Houston believes that because he also contributed $500 to Chief Justice Hornsby it disqualified him to sit, does not compel the same belief by any other Justice.

paign. Such a candidate in a contested race must spend substantial amounts of money, particularly where, as is the case of one seeking election to the appellate bench, he is forced to campaign in 32 counties.

"It is not surprising that attorneys are the principal source of contributions in a judicial election. We judicially know that voter apathy is a continuing problem, especially in judicial races and particularly in contests for a seat on an appellate bench. A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent."

The reasoning of the Texas court is applicable in Alabama as well.

The contributions of Judge Foy Guin to the University of Alabama did not require his recusal in *Wu v. Thomas*, 996 F.2d 271, 275 (11th Cir. 1993), *cert. denied, Wu v. Board of Trustees, Univ. of Alabama*, 114 S.Ct. 1543 (1994). Judge U. W. Clemon, who had given a prejudgeship contribution to Senator Donald Stewart, did not find this to be grounds for recusal, stating: "I have painstakingly searched and reviewed all the relevant papers and, most importantly my conscience, and I know of no facts which would cause a reasonable person to harbor doubts as to my impartiality in this proceeding." *U. S. v. Alabama*, 574 F.Supp. 762, 766 (N.D. Ala. 1983), *aff'd*, 762 F.2d 1021 (11th Cir. 1985); see also *Matter of*

Mason, 916 F.2d 384, 388 (7th Cir. 1990). It is only when there is a direct, pecuniary interest that recusal is required. *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 106 S.Ct. 1580 (1986). That does not exist in this case.

We are the only judges elected by the people of Alabama to serve as a Court of last resort There is no legal reason for us to recuse ourselves in this case. It is inappropriate for us to step aside and have persons not elected by the people of Alabama decide this important case. Given the nature and the urgency of the proceedings, we must discharge our duties as members of the judicial branch of government. It is always difficult to make decisions that may be controversial, but our oaths require us to make the difficult decisions as well as the easy ones. Given the importance of the issue in this case to the citizens of Alabama, we must perform our judicial function.

We do not believe the campaign contributions mentioned herein create a situation in which our impartiality might reasonably be questioned. The contributions by attorneys for the Davis class to the campaign of Justices Kennedy, Cook, and Butts are no different from contributions by attorneys for any other litigants. Such contributions have uniformly been held not to constitute grounds for recusal. The contributions to Chief Justice Hornsby's campaign by Justices Almon, Shores, and Ingram are not disqualifying indications of partiality that would interfere with these Justices' ability to decide the certified question and the appeal according to the law. Rather, these contributions reflect collegial courtesy expressed in a time before this controversy arose.

MOTION DENIED.

Almon, Shores, Ingram, and Cook, JJ., concur.

HOUSTON, JUSTICE (recused).

I have attached as appendices to this statement the materials that form the basis for my recusal in this case.

APPENDIX 1

[STATE SEAL]

SUPREME COURT OF ALABAMA

January 20, 1995

MEMORANDUM

To: Joseph S. Johnston, Esq.
J. Michael Druhan, Jr., Esq.
Albert S. Agricola, Jr., Esq.
Albert L. Jordan, Esq.
B. Glenn Murdock, Esq.
J. Cecil Gardner, Esq.
William H. Reece, Esq.
Gregory B. Stein, Esq.
Charles H. Dodson, Jr., Esq.

FROM: Robert G. Esdale
Clerk, Supreme Court of Alabama

RE: SC1940461—Roe v. Mobile County Appointing Board

Justice Houston has asked that you be informed of his enclosed memo.

If you have no objection to Justice Houston sitting on this case, please reply in writing at your earliest convenience.

RGE:dd

Enclosure

MEMORANDUM

TO: Mr. Robert G. Esdale, Clerk
Supreme Court of Alabama

FROM: Houston, J.

DATE: January 17, 1995

RE: 1940461
Larry Roe, et al. v. Mobile County Appointing Board, et al.; Larry Roe, et al. v. State of Alabama, by and through its Attorney General James Evans, et al.

I have attached a disclosure which I would appreciate your presenting to the attorneys for the parties in the above-referenced matter.

Thank you.

JGHJr:da

Attachment

IN THE SUPREME COURT OF ALABAMA

January 17, 1995

1940461

LARRY ROE, *et al.*

v.

MOBILE COUNTY APPOINTMENT BOARD, *et al.*

LARRY ROE, *et al.*

v.

STATE OF ALABAMA, by and through its Attorney General JAMES EVANS, *et al.*

I was elected as an Associate Justice of the Alabama Supreme Court in the 1992 General Election as the nominee of the Alabama Democratic party.

On December 28, 1993, I contributed $500 to the Chief Justice Sonny Hornsby Reelection Campaign.

Approximately two weeks before the 1994 General Election, I was contacted by Jacqueline Bueno, a staff reporter for *The Wall Street Journal*, who was writing an article on Chief Justice Sonny Hornsby. This article appeared on Wednesday, November 2, 1994, in the Southeast Journal of *The Wall Street Journal*. In this article, Ms. Bueno wrote that I had "become a Hornsby campaign supporter." I do not recall that question being asked; however, that was a reasonable inference that Ms. Bueno could have drawn from the answers that I gave to the questions she asked me.

From December 28, 1993, to the 1994 General Election, I contributed money to the campaign of four other

Democratic candidates (Speaker of the House James S. Clark, Associate Justice Hugh Maddox, Dr. Paul Hubbert, and Judge William Bowen). I did not contribute any money to any Republican candidates during the 1994 Primaries or General Election.

I am required to make this information available to Larry Roe, Perry O. Hooper, Sr., and James D. Martin.

I believe that I can keep the balance nice, clear, and true in answering the certified question addressed to the Supreme Court of Alabama by the United States Court of Appeals for the Eleventh Circuit; however, I will recuse if Messrs. Roe, Hooper, or Martin feel that my participating in answering this certified question will give the appearance of impropriety.

/s/ J. Gorman Houston, Jr.
J. GORMAN HOUSTON, JR.
Associate Justice
Supreme Court of Alabama

APPENDIX 2

ALGERT S. AGRICOLA, JR., P.C.
Attorney At Law
111 Washington Avenue
Montgomery, Alabama 36104
Telephone (205) 832-9900

January 27, 1995

VIA HAND DELIVERY

Mr. Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama
300 Dexter Avenue
Montgomery, AL 36104

Re: *Boggan et al. v. Roe, et al.,*
Case No.: 1940461

Dear Mr. Esdale:

This is in response to Associate Justice Houston's memorandum dated January 17, 1995. We are grateful for the disclosure, and believe that a financial contribution to a political candidate, directly affected by a pending case before his collegues on the Court on an election law issue, should result in a recusal. While we believe that time limits should apply, a contribution in a contested race will certainly give rise to the appearance of a favored choice in the election. Reasonable minds could question the impartiality of the judge as well as the Court, and hence, Canon 3 of the Canons of Judicial Ethics is implicated directly.

Please advise Justice Houston of our concerns.

Also, enclosed for filing is an original and ten copies of a Motion to Recuse.

Very truly yours,

/s/ Algert S. Agricola, Jr.
ALGERT S. AGRICOLA, JR.

ASA,jr.:la

enc.

xc: All counsel of record

APPENDIX 3

MEMORANDUM

TO: Robert G. Esdale, Clerk
Supreme Court of Alabama

FROM: Houston, J.

DATE: January 30, 1995

RE: 1940461 *Larry Roe, Perry O. Hooper, Sr., and James D. Martin v. The Honorable Jerry Hoggan, Probate Judge of Wilcox County, Alabama, et al., In Re: Larry Roe, Perry O. Hooper, Sr., and James D. Martin, Individually and On Behalf of a Class of Persons v. Mobile County Appointing Board, et al.*

I have attached my formal recusal, which I would appreciate your filing for me in the above-referenced matter. Thank you.

I consider this a disqualification as that term is used in Ala. Code 1975, § 12-2-14; and, therefore, I am sending a copy of this to Justice Hugh Maddox, the Senior Associate Justice, and a courtesy copy to the other Associate Justices.

JGHJr:da

Attachment

IN THE SUPREME COURT OF ALABAMA

Case No. 1940461
(Certified Question)

LARRY ROE, PERRY O. HOOPER, SR.,
and JAMES D. MARTIN,
Appellees/Plaintiffs,

vs.

THE HONORABLE JERRY HOGGAN, PROBATE JUDGE OF
WILCOX COUNTY, ALABAMA, *et al.*,
Appellants/Defendants.

IN RE: LARRY ROE, PERRY O. HOOPER, SR., and
JAMES D. MARTIN, Individually and on Behalf
of a Class of Persons,
Plaintiffs/Appellees,

vs.

MOBILE COUNTY APPOINTING BOARD, *et al.*,
Defendants/Appellants.

RECUSAL OF J. GORMAN HOUSTON, JR.
ASSOCIATE JUSTICE, SUPREME COURT
OF ALABAMA

Based upon the concerns that I had concerning this matter, which I set out in a disclosure dated January 17,

1995; the letter dated January 27, 1995, from Albert Agricola, Jr.; and the "Motion to Recuse" filed by Larry Roe, Perry O. Hooper, Sr., and James D. Martin on January 27, 1995, I do hereby recuse in the above-referenced case.

This the 30th day of January, 1995.

/s/ J. Gorman Houston, Jr.
J. GORMAN HOUSTON, JR.
Associate Justice
Supreme Court of Alabama

Larry Roe, et al. v. Mobile County Appointing Board, et al.

MADDOX, JUSTICE (dissenting).

The United States Court of Appeals for the Eleventh Circuit, pursuant to the provisions of Rule 18, Ala.R. App.P., has asked us whether absentee ballots that, on the accompanying affidavit envelope, fail to have the signatures of two witnesses over 18 years of age or that of a notary public or other officer authorized to acknowledge oaths, substantially complies with the requirements of Alabama law, specifically Ala. Code 1975, § 17-10-7.[1]

The majority has included the specific question certified to us by the Eleventh Circuit, but I include it in my dissent also:

> "CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF ALABAMA PURSUANT TO RULE 18 OF THE ALABAMA RULES OF APPELLATE PROCEDURE.
>
> "TO THE SUPREME COURT OF ALABAMA AND ITS HONORABLE JUSTICES:
>
> "It appears to the United States Court of Appeals for the Eleventh Circuit that this case involves a question of Alabama state law that is determinative of the cause, but unanswered by controlling precedent of the Supreme Court of Alabama or any Alabama Court of Appeals. We therefore certify this question for resolution by the highest court of Alabama:

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[1] The Eleventh Circuit Court of Appeals wrote an opinion in the case, and I attach a copy of that opinion, including the dissenting opinion, without the Appendix to that opinion, as Appendix A to this dissent.

"WHETHER ABSENTEE BALLOTS THAT, ON THE ACCOMPANYING AFFIDAVIT ENVELOPE, FAIL TO HAVE TWO WITNESSES AND LACK PROPER NOTARIZATION (FOR EXAMPLE, BALLOT ENVELOPES THAT HAVE ONLY A SIGNATURE OR ONLY ONE WITNESS, OR ON WHICH THE VOTER AND THE NOTARY HAVE SIGNED THE BALLOT BUT THE NOTARY FAILS TO FILL IN THE 'TITLE OF OFFICIAL') MEET THE REQUIREMENTS OF ALABAMA LAW, SPECIFICALLY ALABAMA CODE SECTION 17-10-7, TO BE LEGAL BALLOTS DUE TO BE COUNTED IN THE NOVEMBER 8, 1994 GENERAL ELECTION."

It is interesting to note that the Eleventh Circuit, even though aware of this Court's decisions in *Wells v. Ellis*, 551 So.2d 382 (Ala. 1989), and *Williams v. Lide*, 628 So.2d 531 (Ala. 1993), nevertheless determined that the question presented was "unanswered by controlling precedent of the Supreme Court of Alabama or any Alabama Court of Appeals." I agree with the Eleventh Circuit that *Wells v. Ellis* and *William v. Lide* did not address specifically the question posed in this certification.[2]

---

[2] This determination by the Eleventh Circuit Court of Appeals that *Wells v. Ellis* and *Williams v. Lide* are not controlling precedent on the issue before that Court, is consistent with a conclusion reached by another Federal judge, United States District Judge Robert Propst in *Ralph E. Bradford, Sr., et al. v. The State of Alabama, et al.*, (CV 94-PT-2816-M, United States District Court for the Northern District of Alabama, Middle Division, November 25, 1994), wherein he wrote:

> "On November 18, 1994, this judge preliminarily concluded that the order of the Circuit Court of Montgomery County, Alabama [in Odom v. Bennett] clearly brought about and will bring about changes to voting standards, practices or procedures. With regard to absentee ballot affidavits, § 17-10-7, pro-

Neither *Wells v. Ellis* nor *Williams v. Lide* stands for the proposition that an absentee ballot should be counted whether it is properly witnessed or not. In fact, the rule of law stated in *Wells v. Ellis* is that an absentee ballot should be counted only if it complied with the "the essential requirements of the absentee voting law," and *Williams v. Lide* did not address the issue certified to us by the Eleventh Circuit.

In certifying the question to us, the Circuit Court of Appeals for the Eleventh Circuit wrote a lengthy opinion, in which that Court set out many of the facts surrounding this controversy, and in which that Court listed and commented upon much of the applicable Alabama law.

It is apparent to me from a reading of the Eleventh Circuit Court's opinion that the Court is familiar with the historical facts of this action, and of the serious questions of Federal Constitutional law created when the circuit court, in *Odom v. Bennett*, No. 94-2434-R (Montgomery County Cir. Ct., filed Nov. 16, 1994), accepted jurisdiction of the complaint and issued an injunction directing the counting of absentee ballots that clearly did not substantially comply with the essential requirements of Alabama's election laws.

The Eleventh Circuit Court of Appeals could have decided the Federal Constitutional claims presented to it without showing any deference to this Court, but that

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vides 'Your signature *must* be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older.' (emphasis added). [Footnote 2] It is not clear who represented the voters of Alabama in said case. Of course, the same question might be asked concerning this case. [end of Footnote 2]. This court respectfully disagrees with a conclusion that an 'affidavit' which does not include either of the prescribed attestations 'substantially complies' with the statute. Further, this judge does not agree that *Williams v. Lide*, 628 So.2d 531 (Ala. 1993) so holds. Further, there was no evidence that *Williams v. Lide* itself had been precleared prior to November 8, 1994."

Court, even though recognizing that "time [was] of essence," did defer to this Court. In deferring to this Court, the Eleventh Circuit Court said:

> "There are two ways to show deference to the state decisionmakers in this matter: we can leave the plaintiffs to their state remedies; or we can certify a question to the Supreme Court of Alabama, retain jurisdiction, and await that court's answer. We choose the latter form of abstention; leaving the plaintiffs to their state remedies is neither workable nor appropriate in this case.
>
> "Because Alabama has barred its courts from entertaining statewide election contests, see Ala.Code § 17-15-6 (quoted supra note 4), there is only one state remedy in this case: a contest in the legislature. The legislature, however, is not an adequate or proper forum for the resolution of the federal constitutional issues presented. Moreover, even if the plaintiffs were to intervene successfully in the Montgomery County Circuit Court proceeding, *Odom v. Bennett*, and the Alabama appellate courts were to find—despite the clear jurisdictional bar—that, the circuit court had the power to hear the plaintiffs' constitutional claims, the urgency of this matter counsels against such a course of action. The unnecessary delay that would result were we to leave the plaintiffs to their state court remedy would be particularly insidious: it would extend the time that the two offices at issue remain in limbo, hindering those offices in the handling of state affairs. Time is, therefore, of the essence. Cf. *Harman v. Forssenius*, 380 U.S. 528, 537, 85 S.Ct. 1177, 1183, 14 L.Ed.2d 50 (1965) (holding that a district court did not abuse its discretion in refusing to abstain "[g]iven the importance and immediacy of the problem[ ] and the delay inherent in referring questions of state law to state tribunals"); *Badham v. United States Dist. Court*, 721 F.2d 1170, 1173

> (9th Cir. 1983) ("Although we are mindful of the importance principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote.").
>
> "By certifying the question to the Supreme Court of Alabama, we can accommodate Alabama's interest in having its high court settle the question whether a notarization or the signatures of two witnesses is required before an absentee ballot may be counted. Certification will achieve the proper balance between the interest of federalism and timely resolution of this matter."

I have carefully read the briefs of the parties upon which this case is submitted, and I have also studied the opinion of the Eleventh Circuit Court of Appeals, and other facts that I consider pertinent and necessary to answer the question posed.

Based upon my understanding of the law of Alabama and the law generally applied in other jurisdictions as it relates to absentee balloting, I conclude, as follows:

> (1) Under Alabama law, specifically Ala. Code 1975, § 17-10-7, an absentee ballot must be accompanied by an "affidavit," and the signature of the voter on the "affidavit" must be witnessed by either a notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older.
>
> (2) Under Alabama law, an absentee ballot should not be counted unless the affidavit substantially complies with the *essential requirements* of the absentee voting law; and one of the essential requirements of Alabama law is that the absentee ballot should be accompanied by an "affidavit." A voter's signature that is not witnessed by either a notary

public or other officer authorized to administer oaths, or by two witnesses 18 years of age or older is not a legal "affidavit."

(3) An absentee ballot should not be counted if the irregularity in the affidavit would adversely affect the sanctity of the ballot and the integrity of the election. *Wells v. Ellis*, 551 So.2d 382, 383 (Ala. 1989).[3]

The majority states that *Williams v. Lide* held that an absentee ballot should be counted even though the voter's signature on the affidavit was neither witnessed by a notary public or by two witnesses.

I participated in both *Wells v. Ellis* and *Williams v. Lide*, and I can say, with assurance, that neither of those cases holds that an absentee ballot should be counted if the voter's signature is not properly witnessed. *Wells v. Ellis*[4] involved an election contest and this Court granted an appeal by permission and decided a legal question only —whether Alabama would adopt a "substantial compliance" test or a "strict compliance" test. This Court elected to adopt the substantial compliance rule from a Florida case, *Boardman v. Esteva*, 323 So.2d 259 (Fla. 1975), and set out that rule as follows:

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[3] In *Wells v. Ellis*, this Court set out the "substantial compliance" test, as follows:

"In 1984, the Florida Supreme Court, again faced with an election dispute, reaffirmed the Boardman decision and summarized the "Boardman factors" to be considered in determining whether an election should be set aside:

"'(a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;

"'(b) whether there has been substantial compliance with the essential requirements of the absentee voting law; and

"'(c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.'"

[4] The absentee ballots involved in that election dispute were not before this Court.

> " '(a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;
>
> " '(b) whether there has been *substantial compliance with the essential requirements of the absentee voting law*; and
>
> " '(c) *whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.*' "
>
> "*Bolden v. Potter*, 452 So.2d 564, 566 (Fla. 1984). See, also, *Brown v. Grzeskowiak*, 230 Ind. 110, 101 N.E.2d 639 (1951)." (Emphasis added).

Wells v. Ellis, 551 So.2d 382, 383 (Ala. 1989).

In *Wells v. Ellis*, this Court, after setting out the above quoted rule, said that "[w]e find the *Boardman* rationale to be the correct one for resolving absentee voting statute disputes and, therefore, we adopt the law set out in that decision as it relates to the construction of Ala. Code 1975, § 17-10-4 et seq."

I have gone to the record in *Williams v. Lide*, and I have copies of the actual affidavits that were in dispute in that case. A reading of the facts of *Williams v. Lide* affirmatively shows that this Court affirmed the trial court's rejection of Williams' claim that the ballots of convicted felons should be counted, and *this Court also affirmed the trial court's rejection of two absentee ballots that the trial judge found did not substantially comply with the law*. Although this Court, in *Wells v. Ellis*, adopted the "substantial compliance" rule rather than the "strict compliance" rule, this Court did not adopt a rule that would abrogate the requirement of the law, stated on the absentee form itself that "[the voter's] signature must be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older." The requirement that the ballot have an "affidavit" containing the signature of a notary public or other officer authorized to administer

oaths or by two witnesses over the age of 18 years is not a "technical" requirement as set out in *Wells v. Ellis*, but is an "essential requirement" that relates to the sanctity of the ballot itself, a prong of the "substantial compliance" test set out in *Wells v. Ellis*. Although I agree that a technical failure to comply with a "technical" requirement of the absentee voting law should not invalidate a ballot, I have never voted to agree with an interpretation of Alabama law that would eliminate compliance with the "essential requirements of the absentee voting law," the language used in *Wells v. Ellis*.[5]

I have done substantial research on this question and I fail to locate a single case from any other jurisdiction, where the absentee election laws require an affidavit or other form of certification of the voter's signature, that this requirement of an "affidavit" or other form of certification can be satisfied if there are no attesting signatures.[6]

It seems clear to me that Alabama law states that an absentee ballot must be accompanied by an "affidavit," which is one of the "essential requirements" of the law, and the failure of an absentee ballot to be accompanied with a proper affidavit could obviously "adversely affect the sanctity of the ballot and the integrity of the election," and each of the federal judges who have considered the rule in *Wells v. Ellis* and *Williams v. Lide* seem to agree with my interpretation of those two cases.

Based on the foregoing, I am of the opinion that, under Alabama law, specifically Ala. Code 1975, § 17-10-7, an absentee ballot must be accompanied by an "affidavit," and the signature of the voter on the "affidavit" must be witnessed by either a notary public or other officer authorized to acknowledge oaths or two witnesses 18 years

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[5] *Id.* 551 So.2 at 384.

[6] There is a collection of cases on absentee voting laws in Annot., *Construction of Absentee Voters' Laws*, 97 A.L.R.2d 257.

of age or older, which is an *essential requirement* of the absentee ballot law.

Because of the importance of the issues presented, and because there are still pending Federal Constitutional issues presented to the Eleventh Circuit, I state in some detail the reasons I draw the conclusions that I do.

I

Under Alabama law, specifically Ala. Code 1975, § 17-10-7, an absentee ballot must be accompanied by an "affidavit," and the signature of the voter on the "affidavit" must be witnessed by either a notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older.

I can only begin this portion of my dissent by saying that the provisions of Alabama law are quite specific and clear regarding the requirement of an "affidavit," and the dispute is over what this Court either said or did not say in two cases: *Wells v. Ellis*, 551 So.2d 382, 383 (Ala. 1989), and *Williams v. Lide*, 628 So.2d 531, 536 (Ala. 1993). As I have stated above, the specific question presented here was not presented in either of those cases. As I stated earlier, I participated in both of those cases.

What was the rationale of *Boardman* that is followed in *Wells*? As I read the *Boardman* case, the Florida court balanced the interests of the voters, the candidates, and the Florida legislature, but the Court, as I view it, did not hold that essential provisions contained in Florida's absentee voting statute were of no effect in determining the validity of absentee ballots. The Florida Court, in *Boardman*, was very clear on this. See the discussion in *Boardman*, 323 So.2d at page 265, concerning the Florida requirement that the "application for absentee elector's ballot" be properly executed and placed in an envelope separate from the absentee ballot. See, also, footnote 1, 323 So.2d at pages 263-64, wherein the Court, although not specifically stating that the oath was

an essential part of the statute, nonetheless suggested that it was the intent of the Florida legislature to require the execution of an *oath* in "substantially" the same form prescribed in the statute, which is exactly what the Alabama legislature has done in Ala. Code 1975, § 17-10-7, with respect to the required oath.

In the *Boardman* case, the Court framed the issue in that case, as follows:

> "At issue is whether the absentee voting law requires absolute strict compliance with all its provisions, or whether substantial compliance is sufficient to give validity to the ballot."

323 So.2d at 62.

In my view, the basic holding of the Florida Court in *Boardman* can be gleaned from the portions of 323 So.2d at pages 263, 265 and 269 of 323 So.2d. I would paraphrase the holding, in *Boardman* as follows:

> In the absence of proof of fraud, gross negligence, or intentional wrongdoing on the part of the voters or the election officials, "technically" defective absentee ballots should not be discounted unless "the sanctity of the ballot and the integrity of the election were not maintained." (p. 263) Provisions contained in the absentee voting statute that the legislature considers to be "essential" to the validity of the ballot and, thus, to the preservation of the integrity of the election process, are to be construed as mandatory and given effect in accordance with legislative intent. (p. 265) Provisions contained in the absentee voting statute that are not necessarily deemed by the legislature to be "essential" to the validity of the ballot are to be construed as directory, provided that even a violation of such a directory provision is fatal to the validity of an absentee ballot if the violation could affect the integrity of the ballot or the election. (p. 265)

II.

The rules of statutory construction compel an Interpretation of Alabama's Absentee Election Laws Require Ballots which are not accompanied by a proper affidavit to be Excluded.

What rule of statutory construction should we apply? This Court has previously been asked to construe a State statute by a Federal Court, and in that case, this Court set out the rules that govern our construction. In *John Deere Co. v. Gamble*, 523 So.2d 95, 99-100 (Ala. 1988), this Court said:

> " 'The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. *Advertiser v. Hobbie*, 474 So.2d 93 (Ala. 1975); *League of Women Voters v. Renfro*, 292 Ala. 128, 290 So.2d 167 (1974). If possible, the intent of the legislature should be gathered from the language of the statute itself. *Advertiser v. Hobbie*, supra; *Morgan County Board of Education v. Alabama Public School and College Authority*, 362 So.2d 850 (Ala. 1978). . . .' "*Clark v. Houston County Comm'n*, 507 So.2d 902, 903-04 (Ala. 1987)."

Ala. Code 1975, § 17-10-7, which this Court is asked to construe here, provides:

> "Each absentee ballot shall be accompanied by an envelope upon which shall be printed an affidavit. This affidavit which shall be used in general, special or municipal elections shall be substantially as follows:
>
> " 'State of Alabama
> " 'County of ————————
>
> " 'I, the undersigned, do swear (or affirm) that:
>
> " '(1) I am a resident of ———————— County in the state of Alabama.

" '(2) My place of residence in Alabama is:

_____

(street)

_____, Alabama _____

(city or town) (zip code)

" '(3) my voting precinct (or place where I vote) is: _____

_____

" '(4) My date of birth is _____

_____

month day year

" '(5) I am entitled to vote an absentee ballot because:

"Check only one:

_____ I have moved from Alabama less than thirty days prior to the election.

_____ I will be out of the county or the state on election day.

_____ I am physically incapacitated and will not be able to vote in person on election day.

" 'I further swear (or affirm) that I have not voted nor will I vote in person in the election to which this ballot pertains.

" 'I have marked the enclosed absentee ballot voluntarily and that I have read or had read to me and understand the instructions accompanying this ballot and that I have carefully complied with such instructions.

" 'Moreover, I further swear (or affirm) that all of the information given above is true and

correct to the best of my knowledge and that I understand that by knowingly giving false information so as to vote illegally by absentee ballot that I shall be guilty of a misdemeanor which is punishable by a fine not to exceed $1,000.00 and/or confinement in the county jail for not more than six months.

_____

(Signature or mark of voter.)

" 'Note: Your signature must be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older.

" 'Sworn to and subscribed before me this ——— day of ————, 19—— I certify that the affiant is known (or made known) to me to be the identical party he claims to be.

———————— (Signature of official)

(Title of official)

_____

(Address of official)

OR

" '1st Witness ————————————

Signature

_____

Print name

_____

Address

_____

City Zip Code

" '2nd Witness _____
Signature

_____
Print name

_____
Address

_____
City Zip Code

Alabama Code 1975, § 17-10-9 provides:

> "After marking the ballot and subscribing the oath herein required, the voter shall seal his ballot in the plain white envelope, place that plain white envelope inside the affidavit envelope, complete the affidavit, and shall forward it by United States Mail to the addressee or shall hand it to him in person."

The operative words in the first two sentences of § 17-10-7 are "affidavit" and "shall be." The Legislature has specifically provided that an absentee ballot "shall be" accompanied by an envelope upon which "shall be" printed an *affidavit*. The *affidavit* which "shall be" used in elections "shall be" substantially as the form set out in § 17-10-7.

"The word 'shall,' when used in a statute, usually indicates that the requirement is mandatory. *Prince v. Hunter*, 388 So.2d 546, 548 (Ala. 1980)." *Ex parte Brasher*, 555 So.2d 192, 194 (Ala. 1989). There are exceptions, of course, when "shall" is interpreted as directory. If it is obvious that the Legislature intended "shall" to be permissive or where the validity of the statute is placed in jeopardy, the word "shall" is interpreted as directory. *Prince v. Hunter*, 338 So.2d at 548. Neither of these exceptions is present in the instant case. When the statutory provision does not relate to the essence of the thing to be done and as to which compliance is a

matter of convenience rather than substance, then "shall" can be interpreted as directory; *Rodgers v. Meredith*, 274 Ala. 179, 146 So.2d 308 (1962); but when the provision of a statute is the essence of the thing to be done, it is mandatory. *Mobile County Republican Executive Committee v. Mandeville*, 363 So.2d 754, 757 (Ala. 1978). In the first two sentences of § 17-10-7, the affidavit is the essence of the thing to be done: "Each absentee ballot *shall be* accompanied by an envelope upon which *shall be* printed an *affidavit*. This *affidavit* which *shall be* used in general . . . elections *shall be* substantially as follows. . . ." (Emphasis added). It is mandatory that there be an affidavit; and § 17-10-9 requires that the affidavit must be completed ("the voter shall . . . complete the affidavit").

Although there is no definition of the word "affidavit" in the Alabama Code insofar as I can tell, the word is used in many statutes, among them are Ala. Code 1975, § 15-5-3 ("A search warrant can only be issued on probable cause, supported by an affidavit. . . ."); § 35-9-35 (a landlord before attaching tenant's property to enforce landlord's lien must make affidavit); § 5-19-11 ("No creditor . . . shall bring an action on any debt for collection, and no judgment by default or otherwise shall be entered until the creditor shall file an affidavit stating."); § 6-6-391 ("To obtain such writ of garnishment, the plaintiff . . . must make, before an officer authorized to administer oaths . . . an affidavit. . . ."); § 12-2-3 ("The chief justice and every associate justice of the Supreme Court of Alabama may administer oaths and take any affidavits or acknowledgements authorized or required by law."); § 12-21-4 ("Affidavits required in the commencement or progress of any action or judicial proceeding can be taken without this state before any commissioner appointed by the governor et al. . . ."); § 22-19-61 (An anatomical gift shall be made by the execution of a sworn affidavit filed with the department of public safety. "The affidavit shall be signed by the holder of the driver's

license or nondriver identification card in the presence of two witnesses who shall acknowledge the affidavit in the presence of the donor.

The word "affidavit" is defined as follows:

> "A written or printed declaration or statement of facts made voluntarily, and confirmed by the oath or affirmation of the party making it, *taken before a person having authority to administer such oath or affirmation.*"

(Emphasis added). *Black's Law Dictionary* 58 (6th ed. 1990).

> "[A] sworn statement in writing made esp. under oath or on affirmation *before an authorized magistrate or officer. . . .*"

(Emphasis added.) *Webster's Third New International Dictionary* 35 (Unabridged 1976).

> "A declaration upon oath. In the United States, more generally, a declaration in writing, signed by the party, *and sworn to before an authorized magistrate.*"

(Emphasis added.) *Noah Webster's First Edition of An American Dictionary of the English Language* (1828) (pages are not numbered).

> "A voluntary sworn declaration in writing *made before competent authority.*"

(Emphasis added.) 1 *Funk & Wagnalls New Comprehensive International Dictionary of the English Language* 24 (1982).

> "*Law.* A written declaration made under oath *before a notary public or other authorized officer.*"

(Emphasis added.) *The American Heritage Dictionary* 22 (1969).

> "*Law.* A written declaration upon oath made *before an authorized official.*"

(Emphasis added.) *The Random House Dictionary of the English Language* 24 (1966).

> "*Law.* A written declaration made under oath *before a notary public or other officer.*"

(Emphasis added.) *The American Heritage Dictionary* 84 (Second College Edition 1982).

> "[A] sworn statement in writing made esp. under oath or on affirmation *before an authorized magistrate or officer.*"

(Emphasis added.) *Webster's New Collegiate Dictionary* 20 (1981).

The requirement of an affidavit is strengthened by the following, which appears in § 17-10-7 after the line on which the absentee voter is to place his/her signature or mark: "Note: Your signature *must* be witnessed by either: A notary public or other official authorized to acknowledge oaths or two witnesses 18 years of age or older." (Emphasis added.)

The word, "must," is regarded as mandatory in meaning. *Ex parte Stephens*, 259 Ala. 361, 363, 66 So.2d 901, —— (1953).

The meaning of the word "must" is explained in 64 C.J.S. 1080 as follows:

> "MUST. The word 'must' means obliged; to be obliged; to be legally or morally obliged to do a given thing; to be necessary; required. It creates an obligation and imposes a physical or moral necessity; and it implies obligation or compulsion.
>
> "In ordinary parlance 'must' is a word of command, compulsory in meaning, generally mandatory or imperative, and not directory or discretionary."

There is nothing to indicate that the Legislature, in using the word "must" in this statute, intended for it to have any meaning other than when used in its ordinary sense.

The form of the "affidavit" in § 17-10-7, provides, in pertinent part, as follows:

> "I, the undersigned, do swear (or affirm). . . .
> ". . . .
>
> "I further swear (or affirm). . . .
> ". . . .
>
> "Moreover, I further swear (or affirm). . . ."

"Swear" is defined in *Black's Law Dictionary* 1448 (6th ed. 1990) as meaning:

> "To take an oath; to be bound by an oath duly administered. To declare on oath the truth (of a pleading, etc.)."

"Affirm" is defined in *Black's Law Dictionary* 59 (6th ed. 1990) as follows:

> "To make affirmation; to make a solemn and formal declaration or asseveration that an affidavit is true, that the witness will tell the truth, etc., this being substituted for an oath in certain cases. Also, to give testimony on affirmation."

Following the third oath or affirmation, there is an acknowledgement in the affidavit that false information given "so as to vote illegally by absentee ballot" is a violation of the criminal law:

> "I shall be guilty of a misdemeanor which is punishable by a fine not to exceed $1,000 and/or confinement in the county jail for not more than six months." [7]

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[7] Ala. Code 1975, § 17-10-19, which was repealed by the new Criminal Code, Acts of Alabama 1977, Act No. 607, and was effective January 1, 1980, provided:

"Oath" is defined in § 13A-10-100(b)(3) as follows:

> "Such term includes an affirmation and every other mode authorized by law attesting to the truth of that which is stated. For the purposes of this article, written statements shall be treated as if made under oath if:
>
> > "(a) The statement was made on or pursuant to form bearing notice, authorized by law, to the effect that false statements made therein are punishable; or
> >
> > "(b) The statement recites that it was made under oath, the declarant was aware of such recitation at the time he made the statement and intended that the statement should be represented as a sworn statement, and the statement was in fact so represented by its delivery or utterance with the signed jurat of an officer authorized to administer oaths appended thereto."

Giving effect to the intent of the Legislature," I am compelled to conclude that because § 17-10-7 so clearly directs terms that the absentee voter's signature must be acknowledged by an officer authorized to take oaths or

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"Any absentee voter who shall willfully make or subscribe to an oath falsely in order to qualify himself to vote at a primary or general election as an absentee voter shall be guilty of perjury."

This section was replaced by § 4907 of Act No. 607, now codified at Ala. Code 1975, § 13A-10-103 ("Perjury in the third degree"). Section 13A-10-103 provides:

"(1) A person commits the crime of perjury in the third degree when he swears falsely.

"(2) Perjury in the third degree is a Class B misdemeanor."

"[S]wears falsely" is defined in § 13A-10-100(b)(1) as "[t]he making of a false statement under oath required or authorized by law."

witnessed by two witnesses over the age of 18 years, it would be contrary to the intent of the legislature for this Court to adopt a construction of § 17-10-7 that would dispense with this "essential requirement" of the law, and would "adversely affect the sanctity of the ballot and the integrity of the election." *Wells v. Ellis,* 551 So.2d at 383.

The fundamental rule of statutory construction, the clear language of §§ 17-10-7 and 17-10-9, require me to interpret legislative intent as mandating that an absentee voter's signature must be witnessed by a notary public or other official authorized to acknowledge oaths or by two witnesses 18 years of age or older. That is an "essential requirement" of the law, not a technical requirement, and substantial compliance with that essential requirement of the law not only is mandated but is necessary to protect the sanctity of the ballot and the integrity of the election process.

I am of the opinion that the law of Alabama is clear that an absentee ballot that is not accompanied by an *affidavit* signed by a notary public or other officer authorized to acknowledge oaths, or by two witnesses as required by law fails to substantially comply with "the essential requirements of the absentee voting law," and such an irregularity would "adversely affect the sanctity of the ballot and the integrity of the election." *Wells v. Ellis,* 551 So.2d 382, 384 (Ala. 1989). Consequently, I must disagree with the member of this Court who answer the question differently.

III

The Circuit Court of Montgomery County was without subject matter jurisdiction to determine whether absentee votes should or should not have been counted.

Although the Eleventh Circuit did not ask this Court whether the Circuit Court of Montgomery County had

jurisdiction to determine whether the absentee votes should or should not have been counted, the Eleventh Circuit, in its opinion, did question whether the Circuit Court of Montgomery County had jurisdiction in the first place.

The elections which are the subject of this case involved state officers, and the circuit court of Montgomery County, Alabama, in *Odom v. Bennett,* No. 94-2434-R (November 16, 1994) assumed jurisdiction of the cause and issued an injunction ordering the counting of absentee ballots that election officials had determined had failed to substantially comply with Alabama law. It was that lawsuit that spawned the filing of an action in *Ralph E. Bradford, Sr., et al. v. The State of Alabama, et al.,* (CV 94-PT-2816-M, United States District Court for the Northern District of Alabama, Middle Division, November 25, 1994) and the filing of this action in United States District Court for the Southern District of Alabama.

The Eleventh Circuit Court suggests that the Montgomery County Circuit Court was without jurisdiction to decide whether certain absentee votes should or should not have been counted in this case in light of the provisions of Ala. Code 1975, § 17-15-6. I agree with the Court. Section 17-16-6 states that "[n]o jurisdiction exists in or shall be exercised by any judge, court or officer exercising chancery powers to entertain any proceeding for ascertaining the legality, conduct or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute; and any injunction, process or order from any judge, court or officer in the exercise of chancery powers, whereby the results of any election are sought to be inquired into, questioned or affected . . . save as may be specially and specifically enumerated and set down by statute, shall be null and void and shall not be enforced

by any officer or obeyed by any officer or obeyed by any person. . . ." [8]

The Eleventh Circuit Court also was of the opinion that the decision of the circuit court in *Odom v. Bennett* "failing to exclude the contested absentee ballots [would] constitute[d] a post-election departure from previous practice in Alabama." *Roe v. State of Alabama et al.*, [Ms. 94-7155 and 94-7138, January 4, 1995, Eleventh Circuit Court of Appeals, p. 13]. The United States District Court, in *Bradford, et al. v. The State of Alabama et al.*, reached the same conclusion and enjoined the order issued in *Odom v. Bennett* until it was pre-cleared under Section 5 of the Voting Rights Act.

In view of the fact that the Eleventh Circuit Court mentioned the jurisdictional question, I address that issue for whatever benefit it might be to the Eleventh Circuit in resolving the constitutional issues it faces.

The law seems to be clear that, under the Judicial Article to Alabama's Constitution, Amendment 328, Alabama courts can only exercise such jurisdiction as is

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[8] It would seem to be unquestioned that the Legislature has the power to circumscribe the jurisdiction of a circuit court in Alabama, and I can find no legislative authority that would grant jurisdiction to a circuit court, based on the facts as presented in this case, to enjoin election officials from certifying the results of an election for state officers.

Amendment 328, § 6.04, provides:

> "(a) The state shall be divided into judicial circuits. For each circuit, there shall be one circuit court having such divisions and consisting of such number of judges as shall be provided by law.
>
> "(b) The circuit court shall exercise general jurisdiction in all cases except as may otherwise be provided by law. The circuit court may be authorized by law to review decisions of state administrative agencies and decisions of inferior courts. It shall have authority to issue such writs as may be necessary or appropriate to effectuate its powers, and shall have such other powers as may be provided by law."

granted to them by the Legislature and the Legislature has specifically provided that:

> "*No jurisdiction exists in or shall be exercised by any judge, court* or officer exercising chancery powers *to entertain any proceeding for ascertaining the legality, conduct or results of any election,* except so far as authority to do so shall be specially and specifically enumerated and set down by statute; *and any injunction, process or order from any judge, court* or officer in the exercise of chancery powers, *whereby the results of any election are sought to be inquired into, questioned or affected,* . . . save as may be specially and specifically enumerated and set down by statute, *shall be null and void and shall not be enforced by any officer or obeyed by any person* . . . ." (Emphasis added.)

Ala. Code 1975, § 17-15-6.

The Legislature has further provided, in Ala. Code 1975, § 17-15-1, as follows:

> "The election of any person declared eelcted to the office of . . . treasurer, . . . [or] justice[] of the supreme court . . . may be contested by any person who was at the time of either of the said elections a qualified elector for any of the following causes:
>
> ". . . .
>
> "(3) On account of illegal votes.
>
> "(4) On account of the rejection of legal votes.
>
> ". . . ."

The two offices at issue in this State are the office of State Treasurer and the Office of Chief Justice of the Supreme Court, and Alabama law specifically provides that any contest of an election involving either of those offices shall be filed with the Speaker of the Alabama House of Representatives (Ala. Code 1975, § 17-15-50) and the contest shall be tried by the two houses of the

legislature in "joint convention assembled" (Ala. Code 1975, § 17-15-52). In *Parker v. Mount Olive Fire & Rescue District*, 420 So.2d 31, 33 (Ala. 1982), this Court held that " 'Elections belong to the political branch of the government, and, in absence of special constitutional or statutory provisions, are beyond the control of judicial power.' *Lakeshore v. City of Homewood*, 277 Ala. 444, 446, 171 So.2d 453 (1965) (quoting 29 C.J.S. Elections § 246)."

Even though a question could be raised whether this Court has jurisdiction to answer this certified question from a Federal court,[9] I voted to accept it because the issue before the Federal Courts involve Federal Constitutional rights which must be decided in those forums.[10]

The foregoing opinion was hurriedly prepared because the majority opinion was delivered to my office at 11 a.m. on March 14, 1995, and I had to get this dissenting opinion filed by 3 p.m. on the same date. I reserve the right to make any corrections that I might need to make in this dissenting opinion at a later date, and to write additionally should I desire.

My dissenting opinion addresses the question posed by the Eleventh Circuit. By not addressing the question of Federal jurisdiction, I should not be understood as agreeing with the views expressed in the majority opinion. I can say that my view is that the Eleventh Circuit has correctly interpreted Federal constitutional law on these issues.

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[9] Justice Gorman Houston was of that opinion in this case. He dissented on the question whether to accept the certified question on jurisdictional grounds.

[10] It appears to me that the Eleventh Circuit, even though deferring to this Court to address the question of Alabama law, would not be bound by this Court's interpretation, if this Court's interpretation deprived the plaintiffs of Federal constitutional rights.

IN THE SUPREME COURT OF ALABAMA
March 15, 1995

1940461

LARRY ROE, *et al.*

v.

MOBILE COUNTY APPOINTING BOARD, *et al.*

(94-7138)

LARRY ROE, *et al.*

v.

STATE OF ALABAMA, by and through
its Attorney General JEFF SESSIONS, *et al.*
(94-7155)

In the United States Court of Appeals
for the Seventh Circuit
Cir.Ct.No.: CV-94-7155 & 94-7138

NOTICE

Attached is a special concurrence issued by Justice Cook this date in the above-styled case in which the original opinion was released on March 14, 1995.

Larry Roe, et al. v. Mobile County Appointing Board, et al.

COOK, JUSTICE (concurring specially).

I concur in all respects with the majority opinion. However, I deem it necessary to write specially in order to address an issue raised in the dissent, namely, the question of the state court's subject-matter jurisdiction.

As the dissent observes, the Court of Appeals for the Eleventh Circuit pointedly suggested that the Montgomery County Circuit Court lacked subject-matter jurisdiction over this dispute, and, consequently, that its preliminary injunction was void. The jurisdictional impediment, the court opined, is § 17-15-6, which provides in pertinent part:

> "No jurisdiction exists in or shall be exercised by any judge, court or officer exercising chancery powers to entertain any proceeding or ascertaining the legality, conduct or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute; and any injunction, process or order from any judge, court or officer in the exercise of chancery powers, whereby the results of any election are sought to be inquired into, questioned or affected, or whereby any certificate of election is sought to be inquired into or questioned, save as may be specially and specifically enumerated and set down by statute, shall be null and void and shall not be enforced by any officer or obeyed by any person . . . ."

Jurisdiction was absent, it is suggested, because the legislature invested—not in the circuit courts—but in "[t]he two houses of the legislature, in joint convention assembled," Ala. Code 1975, § 17-15-52, authority to entertain election contests.[1] As we shall demonstrate, this suggestion flies in the face of well-established rules of statutory construction and the long-settled case law of this state.

A. Statutory Construction

" 'The right to contest an election is *not a common-law right.*' " *Longshore v. City of Homewood*, 277 Ala. 444, 446, 171 So. 2d 453, 455 (1965) (emphasis added).

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[1] After quoting at length § 17-15-6, *Roe*, at 6 n.4, that court stated that the Montgomery County Circuit Court Judge "determined that [he] had the authority to enter the injunction *despite the jurisdictional bar* of § 17-15-6." *Roe*, at 8 n.6.

It accrues "only by virtue of statutory enactment." 277 Ala. at 446, 171 So. 2d at 455, and statutes granting this right "are to be *strictly* construed as to those provisions for inaugurating the contest, and which are necessary to invoke jurisdiction." *Groom v. Taylor,* 235 Ala. 247, 251, 178 So. 33, 36 (1937) (emphasis added).

This rule must be considered in conjunction with the principle that where a statute "is ambiguous or uncertain, the court may consider conditions which might arise under the provisions of the statute and examine results that will flow from giving the language in question one particular meaning rather than another." *Clark v. Houston County Comm'n,* 507 So. 2d 902, 904 (Ala. 1987). Also, statutes are to be construed in a manner "that is consistent with *related* statutory provisions." *John Deere Co. v. Gamble,* 523 So. 2d 95, 100 (Ala. 1988) (emphasis added); see also *Abarmson v. Hard,* 229 Ala. 2, 7, 155 So. 590, 594 (1934) (legislative intent is discernible from the construction of a statute in relation to " 'the whole law, or [to] other laws, in pari materia' "). In considering the scope of § 17-15-6, we seek a construction that is consistent with these rules.

The scope of § 17-15-6 is twice expressed in the text of the section. Section 17-15-6 effectively *invests* the joint convention with exclusive jurisdiction to "entertain any proceeding for ascertaining the legality, conduct or *results* of any election," and, conversely, *divests* the judiciary of "the exercise of chancery powers, whereby the *results* of any election are sought to be inquired into or questioned." The section's focal point, however, is the *result* of an election. Election results are the peculiar concern and focus of election *contests.* Thus, § 17-15-6 must be construed *in pari materia* with associated sections in chapter 15, entitled "Contesting Elections."

Indeed, of the 36 sections contained in chapter 15, § 17-15-6 is one of only three sections in which the term "contest," or a form thereof, does not appear in the body of the text, or in which express reference is not made to another section containing that term. The remainder of

sections in chapter 15 are devoted specifically to this end, that is, they define the grounds for election contests,[2] establish substantive and procedural conditions for the institution of contest actions,[3] and provide the mechanisms for securing evidence and testimony in the dispositions of such actions.[4] These sections define the context in which § 17-15-6 applies, and they identify the extent of its jurisdictional bar as encompassing only actions of a *truly judicial nature*, namely, actions initiated to adjudicate the results of a contested election.

The Montgomery County Circuit Court did not, under any interpretation of the facts in this case, purport to adjudicate an election contest. On the contrary, the trial judge defined his role as " 'limited [to the] purpose of ordering public officials to comply with legal principles.' " *Roe*, at 8 n.6. The exercise of jurisdiction for such a purpose has long been a part of the case law of this state.

B. Case Law

All parties must first concede that, as a general rule, the performance of a *ministerial* act may be compelled—

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[2] See § 17-15-1 (prescribing grounds for contests).

[3] See, e.g., § 17-15-20 (concerns the sufficiency of the statement initiating contests for, among others, the offices of "senator, representative in the legislature, judge of the circuit court or district court") § 17-15-29 (concerns the sufficiency of the statement initiating contests for the offices of "judge of probate court and other county and municipal officers"); § 17-15-51 (concerns the sufficiency of the statement initiating contests for "state officers").

[4] See e.g., § 17-15-3 (qualifications of witnesses in contest actions); § 17-15-4 (access of parties in a contest actions to "registration and poll lists"); § 17-15-21 (notice to parties in contest actions); §§ 17-15-24 to -26 (depositions in contest actions); § 17-15-29 (requisites for contesting elections of "county and municipal officers"); § 17-15-31 (examination of ballots by judges in election contests); § 17-15-31 (joint legislative commission elected to receive testimony in election contests); §§ 17-15-55 to -57 (joint legislative commission empowered to procure evidence and testimony); § 17-15-60 (joint legislative "[c]ommission to report conclusions and evidence").

even of state officers in their official capacities—by a circuit court in the exercise of its extraordinary remedial powers. *McDowell-Purcell, Inc. v. Bass,* 370 So. 2d 942, 944 (Ala. 1979); *Hardin v. Fullilove Excavating Co., Inc.,* 353 So. 2d 779 (Ala. 1977). Similarly, acts of such officials that are "illegal, fraudulent, unauthorized, done in bad faith or *under a mistaken interpretation of law,*" may be enjoined. 370 So. 2d at 944 (emphasis added); see also *Wallace v. Board of Education of Montgomery Co.,* 280 Ala. 635, 197 So. 2d 428 (1967). More specifically, from the inception of Act No. 19, 1875 Ala. Acts 101, *first codified,* Ala. Code 1876, § 314, the progenitor of § 17-15-6, this Court has held that the exercise of jurisdiction to compel performance of ministerial acts incident to elections does not violate the provisions of § 17-15-6.

For example, merely six years after the ratification of Act No. 19, this Court, in *Hudmon v. Slaughter,* 70 Ala. 546 (1881), addressed the exercies of jurisdiction over actions brought to compel election officials to count ballots and canvass returns. That case arose out of an election held pursuant to the charter of the City of Opelika, Alabama, for the office of alderman of that city. *Id.* at 549. The "board of supervisors" refused to count ballots that had been cast for Slaughter, and, instead, passed a resolution purporting to void his election. *Id.* Slaughter, alleging that he had been duly elected to the office, sought a writ of mandamus from the Lee County Circuit Court, directing the "[board of supervisors] to count the votes, as shown in the returns made to them, and to certify the result." *Id.* The respondents answered and opposed the petition on the grounds "of alleged irregularities and frauds, both in the registration and in the election." *Id.* Regarding alleged rgisetration irregularities, the respondents contended that "the registration book, or lists, kept by the clerk, with which the [canvassing] board was required to compare the poll-lists, in order to arrive at the result," did not constitute evidence of voters' registration sufficient to satisfy the requirements of the city's charter. *Id.*

The circuit court granted Slaughter's petition for a writ of mandamus, and the respondents appealed. The issues this Court regarded as dispositive were: (1) the "nature of the duties imposed on the [canvassing] board by the charter," and (2) "the sufficiency . . . in form of the registration lists and election returns." *Id.*

Because the Court's discussion of the first question provides the foundation for disposition of this most relevant issue in subsequent cases, we have set forth that discussion in its entirety:

> "It is insisted by the appellants, that the charter conferred on them *judicial,* and not *merely ministerial* functions, in this matter. This claim is based upon the construction of section 3 of the charter, as found on page 352, of the Acts of 1872-73, and approved March 26, 1873. This section, after fixing the qualification of voters in the city election, and making registration in a book kept by the city clerk a pre-requisite, declares as follows: 'That the votes' [cast for the several candidates for mayor and aldermen] 'shall be returned to the existing mayor and council, whose duty it shall be, within five days after the election, to *count* the votes, and *compare* the poll-lists with the registration lists, and reject all votes cast by persons whose names do not appear registered as hereinafter provided; and to declare by publication in a newspaper *published* in the city of Opelika, and by posting notices in at least four public places, the name of the person having received the greatest number of registered votes for mayor, and the names of the six persons having received the greatest number of registered votes for aldermen at said election.'
>
> "It is perfectly clear to our mind, that the duties intended to be imposed on the board by this section are *ministerial,* and in *no sense judicial*—that they are constituted mere canvassers, or supervisors of the election returns, and have no authority to exercise

the judicial power of investigating or determining the validity of the election.

"This view becomes apparent by comparing the former with the present charter, by which it is superseded. A manifest change has been made in the nature and extent of the powers of the board, as regards the whole subject of municipal elections. The former charter expressly constituted the city council to be 'judges of all [such] elections,' and reposed in them 'full power to determine all matters in relation thereto, and ascertain the legality of votes'; and 'to reject all illegal votes, and count only such as are legal' and, in fine to take testimony, and examine witnesses, with the view of deciding the result. These powers are fully commensurate with those possessed by judges authorized to sit and determine regular election contests.— Acts 1869-70, p. 323, § 3' Echols v. The State, ex rel. Dunbar, 56 Ala. 131. Why did the legislature abrogate these powers, which were so clearly expressed, and substitute for them the one simple duty of counting the votes, and declaring the result from a mere comparison of the registration and poll-lists? Can we convict them of doing a useless thing, by which they meant nothing, leaving out of view other potent facts disclosing an obvious intention to the contrary? *That the duties of the board, furthermore, are ministerial, is plain from the additional fact, that the charter declares the board to be guilty of a misdemeanor, and punishable criminally, by fine and imprisonment, for failing or refusing to discharge these duties, as required.*—Acts 1872-73, p. 354, § 4. It is not customary to punish any officer for failure or refusal to discharge a judicial duty, as the discretion devolved carries with it the right to determine whether to perform or not to perform in each adjudged case. Nor can it be supposed, either, that the charter would require the respondents to count

and declare the result within so brief a space as five days after the election, if the intention was to authorize an investigation of irregularities or frauds, other than such as appear *on the face of the returns* and papers before them. The legislative intention is further evinced in this matter by an express provision, declaring that the judge of probate shall have jurisdiction of all proceedings inaugurated for the purpose of contesting such elections, and that the issues formed shall be tried by a jury of disinterested persons—thus reposing elsewhere a power taken away by the new charter from the municipal board. —Acts 1872-73, § 10, p. 355.

"It is noticeable, also, that the respondents are designated in section 10 of the charter, as a 'board of supervisors.' The ordinary duties of such officers are universally recognized as being purely ministerial. They are simply to make a correct statement of the votes cast for each candidate, from the face of the returns, and to ascertain by arithmetical computation who has the majority, and so to certify, or declare, as the statute may require.—Code, 1876, §§ 291-2. It is settled, without controversy, that mere canvassers possess no judicial or discretionary powers, and cannot go behind the returns.—High on Extr. Rem. §§ 60-63; McCrary on Elections, §§ 83-84; Brightly's Elec. Cases, p. 306, note; State ex rel. v. Judge of 9th Circuit, 13 Ala. 805; State, ex rel. Thompson v. Circuit Judge, 9 Ala. 338; Cooley on Const. Lim. 621, 784; Moses on Mandamus, p. 90; Kisler v. Cameron, 39 Ind. 488; State v. Steers, 44 Mo. 223; Clark v. McKenzie, 7 Bush (Ky.) 523.

"It is true that boards of supervisors, or canvassers, must of necessity determine, as a preliminary question, whether the returns before them which they are required to cast up, are 'genuine and intelilgible, and substantially authenticated as required by law'—or, in other words, whether such

documents are in fact returns or not—and the power thus to determine is often said to be in its nature quasi-judicial.—High on Extr. Rem. § 56; McCrary on Elec. §§ 331, 82-83; People v. Head, 25 Ill. 328. Yet *it must always be for the courts to determine, in each given case, whether there is any scope for the operation of this principle, and whether it be bona fide invoked.*

"It is well settled, however, that *in a proceeding by mandamus, to compel a board of canvassers to perform their official duties they can not set up irregularities in the returns, or frauds in the conduct of the election, however gross or monstrous in their character.* These are not matters for the considerations of courts, in applications of this kind, at least where another forum has been provided for the contest of the election, by which a complete and adequate remedy is furnished. High on Extr. Rem. § 56; McCrary on Elec. § 331; State v. Jones, 19 Ind. 356 [81 Am. Dec. 403]; People v. Head, 25 Ill. 328; Brightly's Elec. Cases, p. 306, note. The basis of the principle lies in the fact, that a canvassing board has no power to discard or reject returns of votes, which on their face appear genuine and regular in form, on the ground of frauds committed in the election. Lewis v. Commissioners, 22 Am. Rep. 275, s.c., 16 Kan. 102; Kisler v. Cameron, 39 Ind. 488, supra. In the case of the Attorney-General v. Barstow, 4 Wis. 749, it was said by the court, that canvassing officers were authorized only 'to add up and certify by calculation the number of votes given for any office;' and it was added, that 'they have no discretion to hear and take proof as to frauds, even if morally certain that monstrous frauds have been perpetrated.'

"*That the writ of mandamus will be awarded to compel the discharge of such of these duties as are*

> *merely ministerial, is uniformly admitted by all the authorities.*—Moses on Mandamus, p. 90, and cases above cited; High on Extr. Rem. § 56."

70 Ala. at 549-52 (emphasis added).

The Court's conclusion that counting ballots and canvassing returns were "ministerial," rather than "judicial" duties, presaged the disposition of the second issue, namely, the sufficiency of the registration materials, or, more specifically, the canvassing board's role in assessing such sufficiency. In this connection, the Court hypothesized that extraordinary circumstances *might* justify the canvassing board's refusal to process the returns, such as, the absence of any "registration whatever." *Id.* In such a case, the Court suggested, an election might be "absolutely void." *Id.*

The Court, however, found no such circumstances present in *Hudmon,* for, having examined the registration book, the formal sufficiency of which was challenged, the Court concluded that it "constitut[ed], *on the face of it,* sufficient evidence of a substantial registration as required by the charter." *Id.* at 553. The Court reiterated: "Canvassers . . . have no authority to go behind the face of the returns . . . before them, in order to adjudge questions of either irregularity or fraud. They can only reject such returns as are *void on their face,* as being *so destitute of essential form as to render them unintelligible.*" *Id.* (emphasis added). Deeming the challenged registration materials to be "sufficiently intelligible, and in due form to enable the respondents to count the votes and compare the poll-lists with them," *id.,* the Court affirmed the circuit court's judgment for extraordinary relief.

Similarly, in *Ex parte Pollard,* 251 Ala. 309, 37 So. 2d 178 (1948), this Court considered whether Ala. Code 1940, Tit. 17, § 235 (1958 Recomp.), the predecessor of § 17-15-6, deprived the Marion County Circuit Court

of jurisdiction over a dispute involving the results of a primary election for a position on the Marion County Board of Revenue. 251 Ala. at 310, 37 So. 2d at 179. That case arose out of a dispute involving Ben Henson and Henry Pollard for the Democratic Party's nomination, after three primaries had failed to produce an undisputed nomination. 251 Ala. at 313, 37 So. 2d at 181-82. The failure of the first primary to produce a majority for either candidate had necessitated a second primary, the results of which precipitated an election contest. The "Marion County Democratic Executive Committee" ordered a *third* primary, after it failed conclusively to adjudicate the contest of the second primary. 251 Ala. at 310, 37 So. 2d at 179.

After the third primary, "the returns . . . were canvassed and it was publicly proclaimed that Henson had received a majority of the votes cast." 251 Ala. at 311, 37 So. 2d at 180. Nevertheless, the executive committee certified Pollard as the party's nominee, concluding that Henson had failed to pay a "qualification fee," which, it declared, was necessary for entry in the third primary. *Id.* at 311, 37 So. 2d at 180. Henson then petitioned the circuit court for a writ of mandamus, directing the committee chairman to certify him as the nominee. 251 Ala. at 313, 37 So. 2d at 181. The circuit court assumed jurisdiction of the dispute, and, while Henson's petition was pending therein, Pollard petitioned this Court for a writ of prohibition, "restraining [the court] from . . . proceeding in the matter." 251 Ala. at 310, 37 So. 2d at 179.

This Court denied Pollard's petition. It acknowledged that the "county executive committee" of the party conducting the primary was invested with jurisdiction over primary election contests, and was empowered to sit for that purpose as a "judicial or quasi judicial body." 251 Ala. 313, 37 So. 2d at 182. It ovserved, however: "[*W*]*e are not here dealing with an election contest.*"

251 Ala. 313, 37 So. 2d at 182 (emphasis added). The Court explained: "The executive committee in canvassing and tabulating the returns and declaring the result thereof, and the chairman in certifying the name of the nominee to the probate judge under the provisions of [Ala. Code 1940, Tit. 17, § 366, superseded by § 17-16-36] [5] exercise a *purely ministerial duty.* These duties are *in no sense judicial.*" 251 Ala. 313, 37 So. 2d at 182 (emphasis added). The Court further explained that in performing these functions, the " 'canvassing board has *no power* to discard or reject returns of votes, which *on their face* appear genuine and regular in form.' " 251 Ala. 313, 37 So. 2d at 182 (quoting *Hudmon v. Slaughter,* 70 Ala. 546, 551 (1881)) (emphasis added). This rule applies, the Court added, even if the execuitve committee is " 'morally certain that monstrous frauds have been perpetrater.' " 251 Ala. 313, 37 So. 2d at 182 (quoting *Hudmon,* 70 Ala. at 552). Consequently, it concluded that Tit. 17, § 235 did not deprive the cir-

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[5] Tit. 17, § 366 provided in pertinent part:

> "The county executive committee of the party or parties participating in said primary election shall meet at the courthouse of their counties, not later than Wednesday, noon, next following said primary election, and receive said returns, *canvass* and *tabulate* the same, by precincts, and publicly *declare* the results thereof; and the chairman of each county executive committee shall forthwith, and not later than the next day, *certify* and *return* the chairman of the state executive committee a statement and tabulation, by precincts, of the result of said primary election and of the number of votes received by each candidate therein for office, except candidates for county office, and not later than noon on the Tuesday next following said primary election, the state executive committee, or such subcommittee thereof as may have been appointed by the chairman thereof for such purpose shall meet at the State Capitol in Montgomery and *receive* said returns and *canvass* and *tabulate* the same by counties, and publicly *declare* the result thereof as to all candidates for office therein, except candidates for county office . . . ."

(Emphasis added.)

cuit court of jurisdiction to issue its mandamus requiring the shairman of the executive committee to perform non-discretionary duties, namely, to certify Henson as the Democratic Party's nominee. 251 Ala. 314, 37 So. 2d at 182.

Five years after *Pollard* was decided, this Court reaffirmed the rule as follows:

> "*Canvassing the returns of an election is a ministerial act,* and when it is completed and the results declared an unsuccessful candidate may contest the election . . . .
>
> "The canvassers are controlled by the returns of the inspectors and *have no power to go behind them or inquire into fraud or irregularity,* but they must add together the number of votes each candidate received in the several voting precincts, according to the certificates of the inspectors, and declare the result; *and are subject to mandamus to compel a performance when necessary.* Their duties are confined to computation."

Cosby v. Moore, 259 Ala. 41, 46, 65 So. 2d 178 181-82 (1953) (emphasis added).

More recently, this Court revisited § 17-5-6 and reexamined its sphere of operation in an action initiated to compel election officials to count votes and declare a result. *Sears v. Carson,* 551 So. 2d 1054 (Ala. 1989), involved an election for the office of Franklin, Alabama, town council. The details of the dispute were set forth in *Sears* as follows:

> "[David] Sears and Gibson were on the ballot for the Tuesday, August 23, 1988, election to the Franklin town council. Appellee Gibson was the incumbent town council member. After the polling had ended, the election officials prepared a statement of canvass to deliver to the Franklin town council

(which also serves as the canvassing board). The statement said that Sears had received 44 votes (32 by machine, 8 by challenged ballot, and 4 by absentee ballot) and that Gibson had received 38 votes (33 by machine, 2 by challenged ballot, and 3 by absentee ballot). The results were posted, but the canvassing board did not meet by noon August 24, 1988, as required by Code 1975, § 11-46-55 (cum. supp. 1988).[6] On August 26, 1988, appellant Sears obtained a writ of mandamus from the Macon County Circuit Court that ordered the board to count the votes and declare a winner by August 29, 1988, at 7:00 p.m. That same day, the board met and threw out all of the votes but the machine votes and declared Gibson the winner by a vote of 33-32. Sears filed another petition for writ of mandamus; the circuit court denied it, but, on reconsideration, amended its original order of mandamus to require the board to count all the votes (including absentee and challenged votes) by September 28, 1988. The Council recanvassed the votes on September 27,

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[6] Ala. Code 1975, § 11-46-55(a), provides:

"(a) Not later than 12:00 noon on Wednesday after the election as required in this article the municipal governing body shall proceed to open the envelopes addressed to such governing body which have been delivered by the several returning officers to the municipal clerk, *canvass* the returns and ascertain and *determine the number* of votes received by each candidate and for and against each proposition submitted at such election. If it appears that any candidate or any proposition in such election has received a majority of the votes cast for that office or on that question, the municipal governing body shall *declare* said candidate elected to such office or said question carried, and a certification of election shall be given to such persons by the municipal governing body or a majority of them, which shall entitle the persons so certified to the possession of their respective offices immediately upon the expiration of the terms of their predecessors as provided by law.'"

(Emphasis added.)

> 1988. Sears was declared the winner, and the Council issued Sears a certificate of election . . . . On September 30, 1988, Gibson filed an election contest."

Sears, 551 So. 2d at 1055-56 (footnote quoting § 11-46-55(a) in original).

On appeal of the judgment granting Sears' petition, the canvassing board contended that "§ 17-5-6 deprive[d] the circuit court of jurisdiction over the case and, as a result, prevent[ed] this Court from exercising jurisdiction." 551 So. 2d at 1056. We rejected that contention, explaining that the duties imposed by § 11-46-55(a) required the canvassing board "not to determine if the election was fraudulent or fair, but merely to count the votes and declare the winner." 551 So. 2d at 1056. Quoting *Cosby v. Moore*, 259 Ala. 41, 46, 65 So. 2d 178, 181-82 (1953), we characterized that duty as a " 'ministerial act,' " and determined that "[b]y failing to verify the results of the election, the board [had] assumed a new role never intended by the legislature." We reasoned that to permit the statute "to stand between the judiciary and suc hacts" would authorize "any canvassing board . . . to *change the results of an election by cabal.*" 551 So. 2d at 1056 (emphasis added). Concluding that "[t]he purpose and intent of § 17-15-6 were not to undermine the sanctity of the individual vote," 551 So. 2d at 1056, we held that the statute did not deprive the circuit court of power to compel the canvassing board to count the votes and "declare a winner." 551 So. 2d at 1056.

These cases dispel any doubt that the Montgomery County Circuit Court possessed the power to compel election officials and the Secretary of State (hereinafter collectively designated "Secretary") to count the contested ballots, canvass returns, and certify the results of the election in this case. The counting of votes for the offices of Chief Justice and State Treasurer is regulated by Ala. Const. 1901, art. VIII, § 193; and Ala. Code 1975,

§§ 17-13-1 to -11; the canvassing of returns for those offices is regulated by Ala. Code 1975, §§ 17-14-20 to -27. The following summaries typify the duties designated in *chapter 13*: (1) counting ballots, 17-13-1 to -2; (2) identifying boxes, § 17-13-3; (3) labelling ballots and esaling packages, § 17-13-4; (4) sealing and delivering poll lists and votes, § 17-13-6; (5) certifying votes and filing certificates, § 17-13-7; (6) posting certificates of results, § 17-13-8; (7) sealing and delivering certificates of results, § 17-13-10; and (8) making and delivering copies of certificates, § 17-13-11. The following summaries typify the duties designated in the applicable sections of *chapter 14*: (1) opening and counting election returns, § 17-14-20; (2) publishing results, § 17-14-21; (3) forwarding certificates, § 17-24-21; (4) filing voter lists, § 17-14-23; and (5) filing certificates, § 17-14-24. A thorough search of these sections fails to reveal a single provision that invests the Secretary with authority different in any relevant respect from the authority invested in the election officials involved in *Hudmon, Pollard,* and *Sears.* In other words, the acts designated in chapters 13 and 14, such as, (1) opening, (2) counting, (3) identifying, (4) labelling, (5) sealing, (6) delivering, (7) certifying, (8) posting, (9) filing, (10) publishing, and (11) forwarding, are not different in character than the (1) "counting," (2) "comparing," (3) "posting," and (4) "publishing" required in *Hudmon*; the (1) "canvassing," (2) "tabulating," (3) "certifying," and (4) "declaring" required in *Pollard*; or the (1) "canvassing" and (2) "determining" required in *Sears.*

Moreover, § 17-13-6 and § 17-14-26 both *penalize* officials for failure to perform the duties prescribed in chapters 13 and 14, respectively. Specifically, § 17-13-6 provides in pertinent part: "Any returning officer of the precinct who fails to deliver the statement of votes and poll list to the returning officer of hte county, within [48 hours after the election], *must,* on conviction *be fined* . . . , and must *also* be *imprisoned.* . . ." (emphasis

added). Section 17-14-26 provides in part: "If any officer required to make returns of any election to the secretary of state or to the speaker of the house of representatives fails to make such returns within the time prescribed, he forfeits to the state $500.00 . . . ." These penalty provisions—which appear, both in chapter 13, and in chapter 14—refute the notion that provisions in either chapter authorize the Secretary to exercise discretion in processing election returns. *Hudmon*, 70 Ala. at 549 ("It is not customary to punish any officer for failure or refusal to discharge a judicial duty, as the discretion devolved carries with it the right to determine whether to perform or not to perform in each . . . case.").

These considerations demonstrate that the performance demanded by the Montgomery County Circuit Court, namely, the counting of absentee ballots, was purely *ministerial*. The sufficiency *vel non* of the contested affidavits was—under the bright-line test set forth in *Williams v. Lide*, 628 So. 2d 531 (Ala. 1993)—*facially apparent*. Otherwise stated, it is the *joint convention*, not the Secretary, that the legislature has authorized to "inquire into fraud or irregularity," see *Cosby v. Moore*, 259 Ala. 41, 46, 65 So. 2d 178, 182 (1953), and this inquiry must proceed in strict compliance with §§ 17-15-50 to -63, authorizing and regulating election contests for the offices involved in this case.

The statutes applicable at this stage merely bind the Secretary, in conjunction with the *Williams* affidavit test, *perfunctorily* to count, canvass, and certify all absentee votes accompanied by the voter's (1) signature, (2) address, and (3) reason for using an absentee ballot. In discounting ballots that were facially sufficient, the Secretary not only acted under a mistaken interpretation of the law, but also assumed a role never heretofore authorized by our legislature. Thus, to construe § 17-15-6 so broadly as to deny juriisdiction under facts such as these would enable the *Secretary* to control election re-

sults by fiat, and, consequently, would circumvent the integrated system the legislature has prescribed specifically for contesting elections. 551 So. 2d at 1056. A construction that permits the exercise of jurisdiction in cases such as *Hudmon, Pollard, Sears,* and this one, is thus the only construction under which a practical effectuation of the provisions of chapter 15 is possible.

Also not to be overlooked is the fact that the provisions of § 17-15-6 have been carried forward without relevant change in *every code compilation since their first codification in 1876.* See Ala. Code 1876, § 314; Ala. Code 1886, § 407; Ala. Code 1896, § 1671; Ala. Code 1907, § 459; Ala. Code 1923, § 549; Ala. Code 1940 Tit. 17, § 235; Ala. Code 1940, Tit. 17, § 235 (Recomp. 1958). This judicial construction, which has been applied consistently throughout the statute's history, is, consequently, deemed to have "become a part of [the statute] by legislative adoption." *Spooney v. State,* 217 Ala. 219, 221, 115 So. 308, 310 (1928); see also *Campbell v. Williams,* 638 So. 2d 804 (Ala. 1994); *Edgehill Corp. v. Hutchens,* 282 Ala. 492, 213 So. 2d 225 (1968); *Sloss Sheffield Steel & Iron Co. v. Nations,* 243 Ala. 107, 8 So. 2d 833 (1942). Indeed, "[l]egislative adoption is presumed *conclusive* when repeated reenactments follow a notorious *practical* interpretation." 2B N. Singer, *Sutherland Statutory Construction* § 49.09 (5th ed. 1992) (emphasis added). Thus, the Montgomery County Circuit Court's exercise of jurisdiction to compel the Secretary to perform the ministerial tasks of counting ballots and certifying the returns of the November 8, 1994, election—being consistent with § 17-15-6 and long-established case law—was proper.

Larry Roe, et al. v. Mobile County Appointing Board, et *al.*

MADDOX, JUSTICE (dissenting further).

On March 14, 1995, after noting that the dissenting opinion I was filing "was hurriedly prepared," because I had only four hours within which to prepare and file it, I stated that "I reserve the right to make any corrections that I might need to make in this dissenting opinion at a later date, and to write additionally should I desire." —— So.2d at ——.

I desire to write additionally, to address primarily the special concurring opinion of Justice Cook, filed on March 15, 7995, in which he specifically stated that "[he] deem[ed] it necessary to write specifically in order to address an issue raised in the dissent, namely, the question of the state court's subject-matter jurisdiction." [1] I will also address the recusal issue.

The Jurisdictional Bar

I have carefully read and considered Justice Cook's special concurring opinion, in which he states that the interpretation of Ala. Code 1975, § 17-15-6, by the Eleventh Circuit, an interpretation with which I agree, "flies in the face of well-established rules of statutory construction and the long-settled case law of this state." I must respectfully disagree with that assessment of the Eleventh Circuit's interpretation, because I find rather recent authority of this Court that I believe supports the Eleventh Circuit's interpretation.

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[1] In the normal case, the disagreements on the law could have been addressed in the same opinion, but this case was not formally conferenced; consequently, the "necess[ity] to write specially in order to address an issue raised in the dissent," normally would not have occurred, and clearly there would be no need for our views to be expressed separately and without discussion with our colleagues on the Court.

The latest expression of the law of this State on the jurisdiction of a circuit judge to interfere with an election and any subsequent contest of an election was stated in the so-called "Baxley-Graddick" primary election contest for Governor of Alabama in 1986, when Circuit Judge Jack Carl, at the request of Charles Graddick and others, issued an injunction against the State Democratic Executive Committee, enjoining it from entertaining a contest of the Democratic primary run-off for Governor of Alabama in 1986.

In the Baxley-Graddick contest in 1986, the opposing parties essentially did what the opposing parties did in this case. One candidate, Charles Graddick, sought a State court injunction to enjoin with the tribunal that was entertaining a contest of the election from further proceedings; the other candidates, William Baxley, and parties on his behalf, filed a contest, as allowed by State law. Others who supported Baxley went into a federal court, alleging primarily violations of the Voter Rights Act,[2] just as Larry Roe and others have done in this case.

The Baxley-Graddick contest involved a Democratic primary eelction, where the party executive committee was the tribunal, under provisions of State law, vested with the power to declare the ultimate winner of the run-off election.[3] In that run-off primary election, Charles Graddick had received the most votes, but William Baxley

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[2] The interplay between the federal and state courts in that case on the jurisdictional questions and the application of federal constitutional law in voting rights disputes are strikingly similar, except the parties are basically taking opposite positions. See, *Ex parte Baxley*, 496 So.2d 688 (Ala. 1986); *Henderson v. Graddick*, 641 F.Supp. 1192 (M.D. Ala. 1986); *Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986). Many of the attorneys who represented parties in the Baxley-Graddick matter are now involved in this case.

[3] Here, the contest is over a statewide office and the Legislature has designated itself as the tribunal to determine such contests.

and two electors filed contests. As authorized by State statutes, the chairman of the State Democratic Executive Committee appointed a subcommittee to hear and determine the contest. Graddick filed a motion with the committee to dismiss the contest, and later filed, before Judge Jack Carl, a petition for a temporary restraining order, writ of prohibition, and other extraordinary and equitable relief, to halt the election contest proceedings and all discovery by Baxley. Judge Carl, as Judge Eugene Reese of the Montgomery Circuit Court did in the subject case on petition of the so-called Davis class, granted Graddick his requested relief. Baxley appealed to this Court, asking that this Court vacate Judge Carl's order.[4] This Court did. *Ex parte Baxley,* 496 So.2d 688 (Ala. 1986). What did this Court, in that case, say about the jurisdiction of a circuit court, in view of the plain language of Ala. Code 1975, § 17-15-6? It said exactly what the Eleventh Circuit said in this case, and what I said in my original dissent on the jurisdictional question, that "the trial court [in enjoining the contest was] *without authority and in express violation of statutory and case law.* Code 1975, § 17-15-6; *State v. Albritton,* 251 Ala. 422, 37 So.2d 640 (1948); *Ex parte State ex rel. Tucker,* 236 Ala. 284, 181 So. 761 (1938)." *Ex parte Baxley,* 496 So.2d 688, 691 (Ala. 1986). (Emphasis added.)

This Court vacated the injunction issued by Judge Carl and allowed the State Democratic Executive Committee to conduct the contest, which declared Baxley the winner of the run-off election. Joining in the opinion in *Ex part Baxley* were Jones, Almon, Shores, Adams and Steagall, JJ.; Torbert, C.J., concurred specially with an opinion, in which Houston, J., concurred; Maddox, J., concurred specially; Beatty, J., did not sit.

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[4] There was no appeal taken in this present case, even though the Secretary of State and the Attorney General msut have been aware of the provisions of law barring circuit courts from interfering with the election process.

The four Justices who concurred in the opinion in this case state that "[h]ad the Republican Party appealed from the order of the Circuit Court of Montgomery Conuty issued in November, 1994, the entire controversy involving the November general election would have been resolved long ago," and that "[t]he people of Alabama would have known the outcome of the election, and the losing candidates, had they chosen to do so, could have contested the elections in the state legislature." This statement by the four Justices suggests that they would have affirmed the judgment of Judge Reese and not followed the law set out in *Ex parte Baxley*—i.e., would not have held that Judge Reese, like Judge Carl, was "*without authority and in express violation of statutory and case law*. Code 1975, § 17-15-6 . . ." (Emphasis added.)

Based on the foregoing, and as I stated in my original dissent, to which Justice Cook's special concurrence is primarily addressed, I agree completely with the Eleventh Circuit's interpretation of Ala. Code 1975, § 17-15-6,[5] and I would apply the provisions of that law to Judge Reese with the same force that I voted to apply it against Judge Carl.[6]

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[5] Ala. Code 1975, § 17-15-6 provides, in pertinent part:

"No jurisdiction exists in or shall be exercised by any judge, court or officer exercising chancery powers to entertain any proceeding for ascertaining the legality, conduct or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute; and any injunction, process or order from any judge, court or officer in the exercise of chancery powers, whereby the results of any election are sought to be inquired into, questioned or affected, or whereby any certificate of election is sought to be inquired into or questioned, save as may be specially and specifically enumerated and set down by statute, shall be null and void and shall not be enforced by any officer or obeyed by any person . . . ."

[6] I concurred specially in *Ex parte Baxley*. It appears that the jurisdiction of the SDEC to hold a hearing had been determined; therefore, the state court was without any jurisdiction.

The provisions of Ala. Code 1975, § 17-15-6, creating a jurisdictional bar, are clear. Furthemore, the Legislature of Alabama, in Ala. Code 1975, §§ 17-15-50 through 17-15-63, has "specially and specifically enumerated and set down by statute" that "[t]he houses of the legislature, in joint convention assembled, and presided over by the speaker of the house of representatives, shall constitute the tribual for the trial of all contests for the office of . . . justices of the supreme court. . . ."

In view of the fact that the Legislature, by statute, has "specially and specifically enumerated" how contests of the election of chief justice and treasurer are to be tried, just as the Legislature provided for the tribunal to hear primary election contests in *Ex parte Baxley,* why does Judge Reese have jurisdiction when Judge Carl so clearly did not?

The law has not changed; a circuit court, under the facts of this case, has no more jurisdiction than Judge Jack Carl had in *Ex parte Baxley,* to enjoin the determination of the winner of the November 8, 1994, election. If after the votes are certified, the losing candidate feels that there are grounds for a contest of those results because illegal votes were cast, that party can file a contest with the "two houses of the Legislature," which the Legislature has specially and specifically enumerated as the "tribunal" to try the contests of races involving justices of the Supreme Court, and the state treasurer. Consequently, the law, as interpreted and experssed in *Ex parte Baxley,* specifically says that the Circuit Court of Montgomery County was devoid of any jurisdiction, just as the Eleventh Circuit recognized, and as I state in my original dissent.

Justice Cook cites three Alabama cases that he believes are clear authority for the legal position he takes, and I will discuss those briefly: *Ex parte Pollard,* 251 Ala. 309, 37 So. 2d 178 (1948) (contest of Democratic nomination for county board of revenue); *Hudmon v. Slaugh-*

ter, 70 Ala. 546 (1881) (office of alderman for the City of Opelika); and *Sears v. Carson,* 551 So. 2d 1054 (Ala. 1989) (involved an election for the office of Franklin, Alabama, town council). I think that each of those cases is clearly distinguishable. None of those cases involved a factual setting where a circuit court, before election results were certified, issued an injunction and directed the certifying official to certify certain votes as legal votes. On the other hand, each of those cases involved *an election contest,* not a pre-certification contest. Each of those cases involved a factual setting where the tribual conducting the contest had determined a winner and the official having the responsibility of certifying the tribual's determination of the winner refused to ceritfy the candidate *who had been declared by the tribual deciding the contest to be the winner.* Here, the facts are far different. Here, the circuit court interrupted the process *before* the results of the election were certified, and before any contest was filed in the Legislature. In *Ex parte Baxley,* the actions were filed *after* the results of the eleciton were certified, not before, but the facts are similar to this case in that one candidate was trying to prevent the tribunal established by the Legislature from hearing the contest.

In *Ex parte Baxley,* this Court, with eight members agreeing, said that Judge Carl was "*without authority and in express violation of statutory and case law.* Code 1975, § 17-15-6; *State v. Albritton,* 251 Ala. 422, 37 So. 2d 640 (1948); *Ex parte State ex rel. Tucker,* 236 Ala. 284, 181 So. 761 (1938)." (Emphasis added). 496 So.2d at 691. That case answers the jurisdictional argument.

The Recusal Motion

I did not address in my original dissent the recusal motions that were filed in this case, and several things have occurred since they were filed. From the very start, I was concerned about present members of this Court sitting in a case that involved a question of who would be serving as Chief Justice of this Court for six years.

Although I do not believe that I am legally disqualified,[7] it is my opinion that the members of this Court should have done as members of the Court have done previously, when another member of the Court was intimately connected with the case before the Court—recuse and permit the appropriate apoipnting authority to select a special court. The selection of a Special Supreme Court in such cases changed somewhat with the adoption of Amendment 328 to the Constitution, the Judicial Article.

Before the adoption of Amendment 328, the members of this Court had, on several occasions, recused when a case or controversy pending before the Court involved one of its members. See *Ex parte Alabama Power Co.*, 280 Ala. 586, 196 So.2d 702 (1967); *State Docks Commissioner v. State*, 227 Ala. 521, 150 So. 537 (1933); *Abramson v. Hard*, 229 Ala. 2, 155 So. 590 (1934); *Cook v. Continental Insurance Co.*, 220 Ala. 162, 124 So. 239 (1928); *Riley v. Bradley*, 252 Ala. 282, 41 So.2d 641 (1948); see, also *Johnston v. Alabama Public Service Commisison*, 287 Ala. 417, 422, 252 So.2d 75 (1971) (the court was divided 4-4 and a lawyer was apopinted as a special Justice by the Governor under the predecessor to Ala. Code 1975, § 12-2-14). Since the adoption of the Judicial Article, there have been three occasions when the full Court recused, and the Chief Justice or the senior Associate Justice appointed a special court. See, *Parsons Steel, Inc. v. Beasley*, 600 So.2d 248 (Ala. 1992); *Pippin v. Brassell*, 455 So.2d 816 (Ala. 1984); *Duncan v. Johnson*, 338 So.2d 1243 (Ala. 1976).

Before the adoption of the Judicial Article, special Supreme Courts were appointed by the Governor pursuant to the provisions of Tit. 13, § 15, Code of Ala-

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[7] On March 17, 1995, the Judicial Inquiry Commission, answered a request for an advisory opinion by Justice Terry Butts, which suggests that there may be some serious ethical concerns presented in this case.

bama 1940 (now § 12-2-14, as amended by Act No. 602, Ala. Acts 1969). See, *Ex parte Alabama Power Co.*, 280 Ala. 586, 196 So.2d 702 (1967).

After the adoption of the Judicial Article, in *Duncan v. Johnson, Pippin v. Brassell,* and *Parsons Steel, Inc. v. Beasley,* the sitting Chief Justice, or the senior Associate Justice, based on recommendations from other members of the Court, appointed the Special Supreme Court. In none of the cases since the adoption of the Judicial Article has the authority of the Chief Justice or the senior Associate Justice to appoint a special Court been challenged or questioned, as it has been here.

There was a question in my mind from the date of the adoption of the Judicial Article whether the Governor or the Chief Justice was the appointing authority for a Special Supreme Court. The issue first came up in *Duncan v. Johnson,* and the Chief Justice assumed the authority to appoint. In *Duncan,* no challenge was raised about his authority to do so. If a challenge had been made, I seriously question whether the Chief Justice, or a senior Associate Justice, had that authority, in view of the statutory scheme set out in Ala. Code 1975, § 12-2-14 and § 12-18-7. Under the provisions of § 12-2-14, the Governor can appoint any member of the Bar, or the Governor may also appoint retired judges under the provisions of § 12-18-7, which provides, in part, that "[t]he retiring justice or judge, upon being retired, shall take the oath of office as a retired justice or judge and thereupon become an extra or additional judge of the state," and "[t]hereafter, on the request of the chief justice, the presiding judge of one of the courts of appeals *or the governor,* any such retired justice or judge may serve on the supreme court, on either of the courts of appeals or on any circuit court in the state," and "[s]uch retired justice or judge, when serving on a court in the absence or disqualification of the regular justice or judge, as the case may be, shall have and exercise all

the duties and functions of the regular justice or judge for whom he is substituting." (Emphasis added.)

Before the adoption of the Judicial Article, the law provided that the Governor was vested with the authority to appoint special Justices and special circuit judges. After the adoption of the Judicial Article, I am personally of the opinion that if a special Supreme Court is needed as provided in § 12-2-14, the law says that the Governor at the time the Special Supreme Court is needed would be the one authorized to make the appointments.[8]

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[8] When the Certified Question was initially filed, Jim Folsom, Jr., was Governor. On January 16, 1995, Fob James became Governor.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Civil Action No. 94-0885-AH-S

LARRY ROE, PERRY O. HOOPER, SR., and JAMES D. MARTIN, Individually and On Behalf of a class of Persons,

Plaintiffs,

v.

MOBILE COUNTY APPOINTING BOARD, HONORABLE LIONEL W. NOONAN, WILCOX COUNTY APPOINTING BOARD, HONORABLE JERRY BOGGAN, As Representatives of Those Persons Who Are Designated by Alabama State Law as The Appointing Boards in Each of Alabama's Counties and Those Persons Who Are Designated by Law to Maintain the Possession and Security of All Materials Relating to the November 8, 1994 General Election,

Defendants.

PRELIMINARY INJUNCTION

This matter is before the Court on the Motion for Preliminary Injunction filed by Plaintiffs Larry Roe, Perry O. Hooper, Sr., and James Martin individually and on behalf of a class of persons. After a hearing on such Motion held in Courtroom 5A, United States Courthouse, Mobile, Alabama on this 5th day of December, 1994 the Court GRANTS Plaintiffs' Motion for Preliminary Injunction EXTENDING the Court's Temporary Restraining Order dated November 18, 1994 with respect to all election materials and ENJOINING the Secretary of State of

Alabama from using absentee ballots that do not include either notarization or the signatures of two qualified witnesses for the purpose of certifying any election results and ORDERING the Secretary of State to certify the election results on all races in the general election of November 8, 1994 using vote totals that do not include such illegal absentee ballots.

I. FINDINGS OF FACT

1. The Court FINDS that Alabama law requires that "[e]ach absentee ballot shall be accompanied by an envelope upon which shall be printed an affidavit," Alabama Code § 17-10-7. The Court further FINDS that Alabama law requires that the voter who votes by absentee ballot must sign the affidavit and such signature must be witnessed by either "[a] notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older." Alabama Code § 17-10-7.

2. The Court FINDS that the past practice of the Alabama eelction officials piror to said general election has been to refrain from counting any absentee ballot that did not include notarization or the signatures of two qualified witnesses.

3. The Court FINDS that the past practice of the Secretary of State of Alabama has been to certify Alabama election results on the basis of vote counts that included absentee votes cast only by those voters who included affidavits with either notarization or the signatures of two qualified witnesses.

4. The Court FINDS that after the November 8, 1994 general election the Secretary of State of Alabama was ordered to certify election results based upon vote counts that include absentee ballots that are in direct conflict with Alabama law requiring either a notarization or the signatures of two qualified witnesses. This would have had the affect of changing the rules with respect to the counting of absentee ballots after the election.

II. CONCLUSIONS OF LAW

The Court HOLDS that Plaintiffs have sustained the burden of proof required to prevail on their motion for a preliminary injunction.

A. Substantial Likelihood of Success on the Merits

Plaintiffs underlying claim is a violation of their rights to due process as protected by the Fourteenth Amendment of the United States Constitution and a violation of Federal Law, 42 U.S.C. § 1983. The Court HOLDS that Plaintiffs have shown by a preponderance of the evidence a substantial likelihood of success on the merits of their underlying claims.

> The right to vote remains, at bottom, a federally protected right. If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots; and the question of the availability of a fully adequate state corrective process is germane. But there is precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action.

Griffin v. Burns, 870 F.2d 1065, 1077 (1st Cir. 1978), citing *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673, 50 S.Ct. 451 (1930).

> The question remains, therefore, whether the Constitution bars the Democratic Party from changing the rules after the election has been held. We recognize that some consider the change adopted by the Party to be a laudable one and the direction of recent attempts at Democratic Party reform is quite plainly toward the principle of proportional representation and maximum participation of minority

> views. But the process by which that result is reached is necessarily as important as the result itself. We cannot be blind to the fundamental deficiencies in the fairness of the process of reaching that result. Nor can we overlook the injuries to which those deficiencies gave rise.

Brown v. O'Brien, 469 F.2d 563, 569 (D.C. Cir. 1972) (predetermining plaintiff's equal protection claims), vacated as moot, 409 U.S. 816, 93 S.Ct. 67 (1972). "The due process clause protects the right of . . . voters to have their votes counted." *Curry v. Baker,* 802 F.2d 1302, 1317 (11th Cir. 1986), *cert. denied,* 479 U.S. 1023, 107 S.Ct. 1262, 93 L.Ed.2d 819 (1986).

The Court HOLDS that Plaintiffs have shown by a preponderance of the evidence that it is substantially likely that a Federal court would find that counting the votes cas by absentee ballots that did not include either a notarization or the signatures of two qualified witnesses would dilute the ballot box and thereby deny the citizens of Alabama the right to have their votes count, a right guaranteed to them by the Fourteenth Amendment to the United States Constitution and actionable under 42 U.S.C. § 1983.

B. Substantial Treat of Irreparable Injury

The Court HOLDS that if the Court denied Plaintiffs Motion for Preliminary Injunction Plaintiffs would face the substantial threat of irreparable injury. "The loss of [individual] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). The Court HOLDS that if Plaintiffs motion were denied Plaintiffs would be denied their Constitutional right to have their votes counted. The Court HOLDS that the corrective process of the State of Alabama is too arduous and complicated to protect Plaintiffs from the denial of such right. Such injury is immediate and irreparable and will only be avoided by granting Plaintiffs motion for injunction.

C. Plaintiffs Injury Outweighs the Injury to Defendants

The Court HOLDS that Defendants have offered no evidence of any injury that would result to Defendants if such injunction were granted. Certainly, Defendants have shown no injury that equals the deprivation of Constitutional rights that would result to Plaintiffs if their motion is not granted.

B. The Injunction Would Not Disserve the Public Interest

The Court HOLDS that the injunction would not disserve the public interest. To the contray, the Court HOLDS that to deny Plaintiffs injunction would disserve the public interest as the voting public of Alabama would likely lose confidence in the voting process of this State.

III. SCOPE OF THE PRELIMINARY INJUNCTION

1. By agreement of the parties, with respect to preservation of all election materials, the Court's Temporary Restraining Order dated November 18, 1994 is continued to any voting contest filed by February 28, 1995 or until any such election contests are concluded.

2. The Court ENJOINS Secretary of State of Alabama, Jim Bennett from certifying any election results in the general election of November 8, 1994 with vote totals that include absentee ballots without affidavits that have either a notarization of the voter's signature of the signatures of two qualified witnesses.

3. The Court ORDERS the election officials in all sixty-seevn (67) counties in the state of Alabama to immediately forward to said Secretary of State all vote totals of their respective counties in the November 8, 1994 general election, but that said vote totals are not to include votes cast by absentee ballots without affidavits that include notarization or the signatures of two qualified witnesses.

4. Upon his receiving said vote totals from the election officials in all sixty-seven (67) counties, the Court ORDERS Secretary of State Jim Bennett to certify all election results of the general election of November 8, 1994 in accordance with this injunction.

5. Plaintiffs are REQUIRED to post bond in the amount of $5,000 with the Clerk of the Court.

DONE this 5th day of December, 1994.

/s/ [Illegible]
United States District Judge

(2)

Supreme Court, U.S.
FILED
AUG 16 1995
CLERK

No. 95-64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN DAVIS,
Petitioner,

v.

STATE OF ALABAMA, et al.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS STATE OF ALABAMA, SECRETARY OF STATE, PROBATE JUDGES, SHERIFFS, AND CIRCUIT CLERKS OF ALABAMA IN OPPOSITION TO CERTIORARI

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QUESTION'S PRESENTED

I. Whether the petitioner has failed to establish special and important reasons for granting a writ of certiorari.

II. Whether the United States Court of Appeals for the Eleventh Circuit was correct in finding the *Rooker-Feldman* doctrine inapplicable, because the plaintiffs were not parties to a collateral state court proceeding and had no opportunity to raise their constitutional claims.

III. Whether the United States Court of Appeals for the Eleventh Circuit was correct in holding that, the State of Alabama, through its judiciary, cannot change retroactively well established election rules and practices to alter the outcome of the last election and thereby rescue the candidacy of the incumbent Chief Justice of the Supreme Court of Alabama.

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IN THE

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BRIEF OF RESPONDENTS STATE OF ALABAMA, SECRETARY OF STATE, PROBATE JUDGES, SHERIFFS, AND CIRCUIT CLERKS OF ALABAMA IN OPPOSITION TO CERTIORARI

Respondents The State of Alabama, Secretary of State, Probate Judges, Sheriffs, and Circuit Clerks of Alabama respectfully request that this Court deny the Petition for Writ of Certiorari filed by John Davis.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states, in pertinent part,"Congress shall make no law ... abridging the

freedom of speech, or of the press; or the right of the people to assemble; and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution states, in pertinent part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law ...."

Section 17-10-7 of the Code of Alabama provides as follows:

> Each absentee ballot shall be accompanied by an envelope upon which shall be printed an affidavit. This affidavit which shall be used in general, special or municipal elections shall be substantially as follows:
>
> "State of Alabama
> "County of _____
> "I, the undersigned, do swear (or affirm) that:
> "(1) I am a resident of _____county in the state of Alabama.
> "(2) My place of residence in Alabama is _____ .
> (street)
> _____ , Alabama _____
> (city or town) (zip code)
> "(3) My voting precinct (or place where I vote) is
> _____
> "(4) My date of birth is: _____
> month day year
> "(5) I am entitled to vote an absentee ballot because:
> Check only one:
> ___ I have moved from Alabama less than thirty days prior to the election.
> ___ I will be out of the county or the state on election day.
> ___ I am physically incapacitated and will not be able to vote in person on election day.

"I further swear (or affirm) that I have not voted nor will I vote in person in the election to which this ballot pertains. "I have marked the enclosed absentee ballot voluntarily and that I have read or had read to me and understand the instructions accompanying this ballot and that I have carefully complied with such instructions. "Moreover, I further swear (or affirm) that all of the information given above is true and correct to the best of my knowledge and that I understand that by knowingly giving false information so as to vote illegally by absentee ballot that I shall be guilty of a misdemeanor which is punishable by a fine not to exceed $1,000.00 and-or confinement in the county jail for not more than six months.

_____
(Signature or mark of voter)

"Note: Your signature must be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older. "Sworn to and subscribed before me this ___day of 19___. I certify that the affiant is known (or made known) to me to be the identical party he claims to be.

_____ (Signature of official)
(Title of official)

_____
Address of official

OR

"lst Witness

_____
Signature

_____
Print name

_____
Address

_____
City Zip Code

"2nd Witness

_____
Signature

_____
Print name

_____
Address

_____
City Zip Code"

Section 17-10-10 of the Code of Alabama provides as follows:

> Upon receipt of the absentee ballot, the absentee election manager shall record its receipt thereof on the absentee list as provided in section 17-10-5 and shall safely keep the ballot without breaking the seal of the affidavit envelope. On the day of the election, beginning at 12:00 noon, the absentee election manager shall deliver the sealed affidavit envelopes containing absentee ballots to the election officials provided for in section 17-10-11, and such election officials shall call the name of each voter casting an absentee ballot with poll watchers present as may be provided under the laws of Alabama and shall open each affidavit envelope, review the affidavit to certify that such voter is entitled to vote and deposit the plain envelope containing the absentee ballot into a sealed ballot box. The absentee ballots shall upon the closing of the polls be counted and otherwise handled in all respects as if the said absentee voter were present and voting in person. As regards municipalities with populations of less than 1,000, in the case of municipal elections held at a time different from a primary or general election, such return mail envelopes containing the ballots shall be delivered to the election official of the precinct of the respective voters.

STATEMENT OF THE CASE

This case is about an attempt by state court judges to change retroactively fundamental election laws and practices and thereby rescue the election of the incumbent Chief Justice of the Supreme Court of Alabama. After it became apparent that the 1994 race for Chief Justice would be decided by a razor-thin margin and the incumbent Chief Justice defeated, the executive director of the Alabama Trial Lawyers Association urged the Secretary of State to order the inclusion of unwitnessed absentee ballots in the certified election results. (Dist. Ct. Tr., at 80). The Secretary of State refused.

Section 17-10-7 of the Alabama Code provides "Each absentee ballot *shall* be accompanied by an envelope upon which *shall* be printed an *affidavit*.... Note: Your signature *must* be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older." Ala. Code § 17-10-7 (added emphasis). The last sentence is printed, along with signature lines for a notary and witnesses, on the envelope of every absentee ballot distributed to voters by state election officials. (See exhibit A to this Brief.) The record is undisputed that the 1994 election handbooks distributed by the Secretary of State to probate judges, sheriffs, circuit clerks, members of the legislature, political parties, candidates, and voters stated as follows:

> All persons voting by absentee ballot must have their ballots notarized by a notary public or anyone authorized to notarize documents or two witnesses 18 years of age or older. Otherwise, the ballot will not be counted.

Alabama Election Handbook, at 50 (6th ed. 1994)(attached to this Brief as exhibit B). In addition, for many years, the Attorney General of Alabama advised state election officials that unwitnessed absentee ballots must not be counted. Atty. Gen. Op. No. 80-551 (letter to J. Floyd, Clerk and Register of Court,

Carrollton, Alabama, Sept. 12, 1980) (attached to this Brief as exhibit C). The record, as developed when the preliminary injunction was entered and as confirmed in recent discovery, shows that the uniform and longstanding statewide practice of election officials has been not to count unwitnessed absentee ballots.

A day or two after the Secretary of State refused to include unwitnessed absentee ballots in the certified vote totals, Michael Odom and John Davis sued the Secretary of State and demanded that state election officials count unwitnessed absentee ballots in the race for Chief Justice. (Dist. Ct. Tr., at 81). Messrs. Odom and Davis, represented by members of the Alabama Trial Lawyers Association and allies of the incumbent Chief Justice, alleged that, based on the instructions of the Secretary of State, election officials throughout the State had excluded thousands of unwitnessed absentee ballots from certified results of the election. *Odom v. Bennett,* no. 94-2434. The Circuit Court of Montgomery County nevertheless ordered the inclusion of unwitnessed absentee ballots in the election results after hearing *undisputed* testimony from state officials that unwitnessed absentee ballots have regularly been excluded by election officials.

No voter, candidate, or official filed any suit before the 1994 election to require counting of unwitnessed absentee ballots, even though the Secretary of State had published clear instructions for voters and election officials that these defective ballots would not be counted. Similarly, no one sought a new Attorney General opinion on this issue before the election. This purported need to "enfranchise" voters arose *a week after the election* when the candidacy of the incumbent Chief Justice appeared to be in jeopardy.

On November 18, 1994, the United States District Court for the Northern District of Alabama enjoined the enforcement of the *Odom* order, because the order constituted a change in

election laws that had not been precleared under section 5 of the Voting Rights Act, 42 U.S.C. §1973c. *Bradford v. State of Alabama,* no. 94-PT-2816-M (copy of order attached as exhibit D to this Brief). On November 22, 1994, the three judge court in *Bradford* dissolved that in junction upon receipt of a preclearance letter dated November 22, 1994, from the United States Attorney General. In a later opinion, Judge Robert Propst wrote that the jurisdiction of the district court was limited, under the Voting Rights Act, but that he was "repulsed" by the events at issue. (Opinion attached as exhibit E to this Brief.)

After hearing undisputed testimony from state officials, including the Secretary of State, that unwitnessed absentee ballots have been regularly excluded from election results, the United States District Court for the Southern District of Alabama entered a preliminary injunction on December 5, 1994, that the retroactive change of election law by the Circuit Court of Montgomery County violated the federal civil rights of Larry Roe, Perry Hooper, Jim Martin, and other voters of Alabama, under the first and fourteenth amendments. The district court described this attempt to change the election rules as "abominable" and "contemptible." (Dist. Ct. Tr., at 170-71.) On January 4, 1995, the U.S. Court of Appeals for the Eleventh Circuit affirmed and ruled that the change in election laws resulted in "fundamental unfairness" under the first and fourteenth amendments. *Roe v. State of Alabama,* 43 F. 3d 574 (11th Cir. 1995). The Eleventh Circuit, however, in the interest of comity, certified the question of state law whether to count unwitnessed absentee ballots to the Supreme Court of Alabama. On January 17, 1995, Davis filed a petition for rehearing. The Eleventh Circuit denied Davis's petition for rehearing on February 23, 1995, and Davis did not seek timely review of that order in this Court. When the Supreme Court of Alabama answered the certified question in the affirmative, the Eleventh Circuit on April 26, 1995, remanded this proceeding for a final and speedy

trial and issued the mandate forthwith. *Roe v. State of Alabama*, 52 F. 3d 300 (11th Cir. 1995). On May 26, 1995, Circuit Justice Anthony Kennedy denied Davis's application for a stay pending the filing of a petition for writ of certiorari. Since then, extensive discovery has taken place, and a trial of the plaintiffs' request for a permanent injunction has been scheduled for September 19, 1995, if necessary. Both the plaintiffs and State defendants have moved for summary judgment against John Davis, and those motions have been submitted to the district court.

REASONS TO DENY THE WRIT

Ordinarily, the Attorney General of Alabama must defend the constitutionality of rulings of the courts of Alabama, but this case is different (and hopefully *sui generis*). The Attorney General cannot defend the orders of the state courts at issue without violating his oath of office to uphold the Constitution and laws of the United States and the State of Alabama and his ethical obligation of candor to this Court. Unfortunately, the decisions of the state courts make intervention by the federal courts necessary and even raise additional concerns about the violation of the plaintiffs' civil rights. Simply put, the rulings of the courts of Alabama threaten the integrity of the electoral process.[1]

The State of Alabama and all State defendants oppose the petition of John Davis on four grounds. This Brief addresses each of these four objections in separate parts. Part one explains why the plaintiffs' injury is severe and cannot be justified by a compelling governmental interest. Part two explains how the

---

[1] John Davis complains that this litigation has prevented the certification of the election of the Chief Justice, but Davis fails to mention that *his* insistence on continuing this litigation is the *only* obstacle to certifying the election results. The plaintiffs and all other defendants are prepared to resolve this matter immediately. Their refusal to surrender this matter to Mr. Davis does not give rise to a basis for reversing the considered judgments of the district court and the Eleventh Circuit.

Rooker-Feldman doctrine was correctly analyzed by the Eleventh Circuit. Part three addresses how the federal courts sought to defer to the State of Alabama, but the state judiciary actually compounded the violation of the plaintiffs' civil rights. Part four addresses how the petitioner has failed to identify special and important reasons for granting the writ.[2]

I. This Case Is About Stuffing the Ballot Box.

"[T]he Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The rulings of the state courts that unwitnessed absentee ballots must by counted (in a desperate attempt to rescue the election of the incumbent Chief Justice) crystallized the plaintiffs' constitutional claim. The review of that claim by the federal courts involves a two step process:

> ... It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests

---

[2] Davis's petition also appears to be untimely. Supreme Court Rule 13.4 provides as follows: "The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice)." S.Ct. R. 13.4. The petition filed by John Davis challenges the holdings and reasoning of the Eleventh Circuit in its decree of January 4, 1995. That is the only decree of the Eleventh Circuit that addressed the merits of the plaintiffs' complaint and the application of the *Rooker-Feldman* doctrine, both of which John Davis asks this Court to review. These matters were not addressed in the remand order entered with the mandate by the Eleventh Circuit on April 26, 1995. Davis filed a petition for rehearing on January 17, 1995, and that petition was denied by the Eleventh Circuit on February 23, 1995. As to the January 4, 1995, decree, the time for filing a petition for a writ of certiorari expired on May 24, 1995, almost two months before John Davis filed this petition.

> put forward by the State as justification for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiffs' rights. Only after weighing all of these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional....

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

This Court has explained that this is a "flexible standard":

> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." ...

Burdick v. Takushi, 112 S. Ct. 2059, 2063 (1992); *see also Duke v. Smith,* 13 F. 3d 388 (11th Cir. 1994); *Duke v. Cleland,* S F. 3d 1399 (11th Cir. 1993). The application of that standard in this case is straightforward and uncomplicated.

A. The Plaintiffs' Injury is Severe.

As the Eleventh Circuit found in its January 4, 1995, decision, the injury asserted by the plaintiffs - "stuffing the ballot box" - is severe. That Court stated

> We agree that failing to exclude the contested absentee ballots will constitute a post-election departure from previous practice in Alabama. *See Griffin v. Burns,* 570 F. 2d 1065, 1075 (1st Cir. 1978). This departure would have two effects that implicate fundamental fairness and the propriety of the two elections at issue. First, counting ballots that

> were not previously counted would dilute the votes of those voters who actually went to the polls on election day. Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the notarization/witness requirement. *See, e.g., Brown v. O'Brien,* 469 F. 2d 563, 569 (D. C. Cir.), *vacated as moot,* 409 U.S. 816, 93 S. Ct. 67, 34 L.Ed. 2d 72 (1972)....

Roe, 43 F. 3d at 581. As this Court held more than thirty years ago, in a case arising from Alabama, "The right to vote can neither be ... destroyed by alteration of ballots ... nor diluted by ballot-box stuffing .... And the right of suffrage can be denied by the debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. at 555; *see also United States v. Saylor*, 322 U.S. 385 (1941). This severe injury cannot be tolerated absent a compelling governmental interest.

B. There Can Be No Compelling State Interest in Stuffing the Ballot Box .

The State of Alabama concedes that it cannot assert any interest to justify the rulings of the courts of Alabama. Any interest in "enfranchising voters" is belied by the absence of any authenticity of the contested absentee ballots and the countervailing concern of disenfranchising those who would have voted but for the witness requirement. In addition, stripping the state absentee ballot laws of the witness requirement can only worsen the undisputed abuse of absentee ballots that has long existed in Alabama. *See Roe*, 43 F. 3d at 581 n. 13. "[T]he very integrity of the election process" requires that the unwitnessed absentee ballots not be counted. *Duncan v. Poythress,* 657 F. 2d 691, 703 (5th Cir. 1981). Compounding this problem is the fact

that the purported interest advanced by the Alabama judiciary came to light only after all ballots had been cast in the general election and it became apparent that the election of the incumbent Chief Justice was in jeopardy. The only constitutional context for this purported interest in "enfranchising voters" is a prospective application where all the candidates and voters know the rules well in advance of the election.

Clearly, "federal relief [is proper] where broad-gauged unfairness permeates an election even if derived from apparently neutral action." *Griffin*, 570 F. 2d at 1077. Condoning the stealing of a statewide election cannot be disguised as "enfranchising voters." If a federal court must abstain from remedying this injury, then the first and fourteenth amendments are hollow guarantees for the voters of Alabama.

II. The Rooker-Feldman Doctrine Is Inapplicable.

John Davis's argument that the *Rooker-Feldman* doctrine bars the preliminary injunction entered by the district court and affirmed by the Eleventh Circuit fails. As the Eleventh Circuit held, it is undisputed that the plaintiffs were not parties to the state court litigation. 43 F. 3d at 580. "Second, because the plaintiffs were not parties to the circuit court action, the plaintiffs had no opportunity to raise their constitutional claims in the circuit court and their claims, therefore, were not considered by the circuit court." *Id.* Indeed, the violation of the plaintiffs' civil rights did not occur until the State court ordered state election officials to change the rules of the election. Davis would have this Court hold that, if a state court violates the federal civil rights of voters who are not parties to the state court action, those voters must seek relief from the state court that violated their civil rights. Davis would shut the doors of the federal district courts to the violation of federal civil rights by state court decrees in cases where the injured person had no opportunity to raise his claim.

Davis erroneously argues that this case is different because the Alabama Republican Party intervened in the state court litigation and the intervenor's attorney later served as *one* of the attorneys for the plaintiffs in this case, even though the constitutional issues were not raised in the state court suit. Davis cites no authority for this breathtaking, expansive view of the *Rooker-Feldman* doctrine, which equates clients with one of their attorneys in a separate proceeding where the client is not a party. Davis does not cite any authority for the proposition that a political party has standing to complain about the violation of these plaintiffs' civil rights, and Davis does not cite any authority that equates a political party with all of its members for purposes of *Rooker-Feldman*, res judicata, or any similar doctrine. The bottom line is that these plaintiffs were not parties to the state litigation; the state court violated their civil rights; the claims of these plaintiffs were not submitted to the state court; and these undisputed facts make the *Rooker-Feldman* doctrine inapplicable.

III. The Decision of the Supreme Court of Alabama Actually Compounded the Plaintiffs' Injury.

Davis erroneously argues that federal intervention is improper because the State's highest court has since ruled that unwitnessed absentee ballots must be counted. By certifying the question of state law to the Supreme Court of Alabama, the Eleventh Circuit reasonably sought to "accommodate Alabama's interest in having its high court settle the question whether a notarization or the signatures of two witnesses is required before an absentee ballot may be counted." *Roe v. State of Alabama,* 43 F. 3d 574, 583 (11th Cir. 1995). The Eleventh Circuit did so because "federal courts should refrain from holding a state election law unconstitutional when a reasonable alternative cause of action exists." *Id.*, at 582. If the Supreme Court of Alabama had followed the plain language of the Code of Alabama and held that unwitnessed

absentee ballots cannot be counted under Alabama law or made its ruling prospective only, the plaintiffs' claims would have become moot and federal court intervention would now be unnecessary. That did not happen, however.

Unfortunately, the Answer of the Supreme Court of Alabama (the Answer) worsened the severity of the plaintiffs' injury. The Answer is internally inconsistent and was decided in violation of traditional notions of fair play and substantial justice in the following general areas: (1) the refusal of certain members of the Court to recuse themselves; (2) the unprecedented attempt to revise the findings of fact by the federal courts; (3) the failure to certify the need for a special court as mandated by Alabama law; (4) the unauthorized and unsolicited discussion of federal jurisdiction; and (5) the egregious illogic of the decision on the merits. The plaintiffs' objections on these grounds heightens the need for swift justice from the federal courts.

A. The Disqualification Issue.

The refusal of certain members of the Supreme Court of Alabama to recuse themselves raised new issues of constitutional concern:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that"every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

> *Tumey v. Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United* States, 348 U.S. 11, 14.

In re Murchison, 349 U.S. 133, 136 (1954); *see also Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (where the mayor's executive responsibilities gave him a "partisan" interest in maintaining a high level of contributions from fines collected in his court). This issue, of course, is not new for cases involving the Supreme Court of Alabama. *See Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) (where this Court vacated an opinion of that court for the failure of a member to recuse himself).

Disqualification of all but one member of the Supreme Court was required both by extrajudicial matters and by the determination by the Supreme Court itself. The issue of recusal was raised first by a member of the Supreme Court, Justice Houston, on January 20, 1995. Justice Houston recused himself because he had contributed $500 to the campaign of the Chief Justice. The plaintiffs then filed their motions for recusal on January 27, 1995, and February 15, 1995. The Attorney General filed a response and objection on the issue on March 1, 1995. The application for rehearing filed by the Attorney General on March 24, 1995, which was stricken by the Supreme Court of Alabama on March 31, also raised issues regarding disqualification.

Disqualification was required, as a matter of federal constitutional law, for six members of the Supreme Court, as a result of two general extrajudicial matters. First, the undisputed record shows that, of the seven members of the Supreme Court who did

not recuse themselves, three had made substantial cash contributions to the campaign of the incumbent Chief Justice. These political contributions were to an interested person in a case involving his candidacy where his opponent is a litigant. Second, the undisputed record shows that three other members of the Court had campaigned actively on a political ticket with the Chief Justice in the November general election; received substantial contributions from the law firm in which the son of the Chief Justice is a named partner; received substantial contributions from the lawyers representing John Davis in this litigation; and will have their vote totals affected by the outcome of this litigation. Two of these three members also shared political and polling consultants with the Chief Justice in the November election, and one of the two made well publicized and highly critical comments about the entire Republican ticket for the Court, which included plaintiff Hooper. The third member's campaign manager also contributed $1,000 to the campaign of the Chief Justice.

Apart from these extrajudicial matters, the Answer itself also raised three issues of the need for disqualification. First, on March 17, 1995, the Alabama Judicial Inquiry Commission responded to Justice Butts's commendable request for an advisory opinion on this issue and stated that, despite the decision of this Court, Justice Butts should

> recuse [him]self from any future participation in the above referenced case. The Commission bases its recommendation on the totality of the circumstances with special focus on the apparent interrelationship of your campaign with that of the incumbent Chief Justice. The Commission views recusal as especially appropriate not only due to the above factors but also because of the climate surrounding the 1994 Alabama elections.

(See exhibit F.)

Although the Commission apparently considered itself bound, as a matter of *stare decisis*, by the one day earlier decision of the Supreme Court, the Commission stated, with the following quotation, that Alabama law demands the appearance of justice:

> The appearance of fairness is virtually as important as is fairness itself. One of the essential ingredients of an effective judiciary is the high level of respect accorded it by the citizenry. Except for the impartiality of those who occupy the role of judge, both in act and appearance, the level of respect necessary to a strong and effective judiciary will fail. It is the essence of the system that any position of interest or bias is sufficient cause for disqualification of the judge, and *the right to raise and insist upon the causes of disqualification must be zealously guarded.*

Morgan County Commission v. Powell, 293 So. 2d 830, 840 (Ala. 1974)(emphasis added).

The Supreme Court ruled on the disqualification issue one day before the Judicial Inquiry Commission met, and Justice Maddox stated that the decision of the court was released in a hurried manner, as he was given only four hours' notice to prepare his dissent. Justice Kennedy, who did not vote but sat on this case and is a member of the Commission, was presumably aware of the related timing of these events. Justice Maddox also mentioned in a supplemental dissent that the Court did not discuss this case in a conference as is customary. These facts only diminished the appearance of justice in this matter.

The second matter concerns the animosity displayed in the Answer toward the plaintiffs, their attorneys, and the federal courts. It is well-established that a judge can become so "personally embroiled" in a dispute with a lawyer, litigant, or other participant that it requires disqualification and raises issues under the due process clause of the fourteenth amendment. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); *Johnson*

v. Mississippi, 403 U.S. 212 (1971); *Taylor v. Hayes*, 418 U.S. 488 (1974). "Trial before 'an unbiased judge' is essential to due process." *Johnson*, 403 U.S. at 216.

The Answer creates concern about animosity toward the participants in several respects. In the determination of the disqualification issue itself, the Answer stated that the timing of the motion filed by the plaintiffs' attorneys "approaches unacceptable conduct. It is certainly conduct indicating a lack of understanding of a lawyer's responsibility as an officer of this Court and of the Eleventh Circuit Court of Appeals, if not indicating an outright disrespect for both courts." Answer at 60. This statement cannot be squared with the precedent of the Supreme Court that "the right to raise and insist upon the causes of disqualification must be zealously guarded." *Morgan County*, 293 So. 2d at 840.

The Supreme Court also harshly criticized attorney Algert Agricola for his strategy in not appealing the preliminary injunction entered in *Odom*:

> ... Although Mr. Agricola gave oral notice of appeal in open court, he never filed a notice of appeal. Under Alabama law, an appeal will lie if filed within 14 days after an order granting a preliminary injunction. Had the Republican Party appealed from the order of the Circuit Court of Montgomery County issued in November, 1994, the entire controversy involving the November general election would have been resolved long ago. The people of Alabama would have known the outcome of the election, and the losing candidates had they chosen to do so, could have contested the election in the state legislature.
>
> Counsel for the Republican Party, Algert S. Agricola, Jr., for "strategic reasons," decided that it was in the best interests of his clients, the Republican candidates, Hooper and Martin, to seek relief in a federal forum. Those candi-

> dates, along with Larry Roe (a voter who voted for these Republican candidates), filed a complaint in U.S. District Court for the Southern District of Alabama in Mobile. The plaintiffs were represented by Albert L. Jordan, Joseph S. Johnston, and J. Michael Druhan. Mr. Agricola subsequently joined these lawyers as counsel for the Republican candidates....

Answer, at 5-6. A contrary argument could be made, however, that the Supreme Court of Alabama could have brought about a quick resolution of this matter by exercising its power to superintend the circuit court based on its lack of subject matter jurisdiction. [3] Blaming the delay of this matter on the attorneys for one side did not serve the appearance of impartiality. Instead, the Supreme Court of Alabama proved that Mr. Agricola's client would have been wasting its time had it appealed the state law issue to that court.

The Supreme Court also reviewed *sua sponte* the relationships of the plaintiffs to their political party, stating as fact matters that are not in the record and challenging the determination of the *Rooker-Feldman* doctrine by the Eleventh Circuit:

> The Republican plaintiffs seek to evade the *Rooker-Feldman* doctrine on the grounds that it is not they, but their party, that intervened in *Odom v. Bennett*. This argument has no merit. The interests of these Republican candidates are identical to the interest of the Republican Party and to permit them to evade *Rooker-Feldman* on this basis would destroy it. In addition to having the same lawyers, the plaintiffs have the closest possible relationship to the Republican Party. They are executive officers of the Republican Party.

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[3] As Justice Maddox explained in his dissent, the jurisdictional bar is clear. Ala. Code §17-15-6 (1987); *Parker v. Mount Olive Fire & Rescue District*, 420 So. 2d 31, 33 (Ala. 1982).

Answer, at 26-27. Ironically, the Supreme Court of Alabama, however, did not see any common interest or close relationship between the Chief Justice and the other members of that court, who are all fellow Democrats and some of whom ran on the same ticket in the same election; nor did the Court see any irony in invoking the *Rooker-Feldman* doctrine while reviewing the opinion of the Eleventh Circuit on issues of federal law.

The Supreme Court also did not retreat from criticizing the federal courts in this matter:

> By issuing and upholding an injunction in this case, the federal courts have violated the basic tenets of federalism and the longstanding rule against interference by federal courts in state election matters....
>
> Our certification procedures assume that any federal court certifying a question to this Court has jurisdiction of the underlying cause and that the answer to the question is determinative of the cause. The procedure providing for certified questions was adopted to further the return to federalism in this country. Those who drafted the rule, a group including several present members of this Court never imagined that the federal courts would assume jurisdiction of a case previously decided by a state court, invalidate the order of the state court, ignoring federal precedent in doing so, and then have another federal court, on an appeal from a preliminary injunction — where the parties had no notice that the hearing would be on the merits and which is, at best, entered on an incomplete record — ask this Court to answer a question of state law, stating at the same time that the answer of this Court will not be considered in that federal appellate court, no matter what the answer is, in determining the case.

Answer, at 28-29. Apparently, the Supreme Court did not appreciate the effort of the Eleventh Circuit not to intrude unnecessarily into the state election.

These extraordinary criticisms of the plaintiffs, the lawyers, and the federal courts call into question the appearance of justice in this matter. They suggest that members of the Supreme Court of Alabama became too embroiled in this controversy. With all respect, the Answer reads more like a brief than a judicial opinion.

The third matter regarding disqualification relates to the several irregularities of the actual decision on the disqualification issue. First, the Answer stated that the disqualification issue should have been raised first in the Eleventh Circuit, but that is entirely contrary to logic, precedent, and the opinion of the Supreme Court that the federal courts should not have heard any aspect of this case. John Davis has argued that the federal courts cannot address this issue, but the issue of due process under the fourteenth amendment is clearly within the jurisdiction of the federal courts. In the certified question procedure, the federal courts are the next proper place to raise this issue. Second, when the Supreme Court ruled that the disqualification issue should have been raised in the federal courts before certification, the court failed to consider that there was an adequate remedy, under state law, to cure the disqualification problem. Section 12-2-14 of the Code provides for the appointment of a special court by the Governor when the number of justices competent to hear the case falls below six. Third, the Supreme Court stated that the plaintiffs' attorneys inappropriately raised the disqualification issue, but in fact the members of that court have a duty to raise the issue on their own initiative. Fourth, the Supreme Court stated that the disqualification issue was raised after the briefing schedule, but the record shows that the issue was raised before any briefs were filed and all papers on disqualification were filed before the close

of the briefing schedule. [4] Fifth, and somewhat incredibly, the Supreme Court stated that the disqualification issue was not raised until "the decision of this Court was in draft form and was literally ready for release within days." If this statement is true, then it means that the court drafted its opinion *before* the attorneys submitted their arguments.

The disqualification question was not close, but four members of the Supreme Court of Alabama still got it wrong. This Court cannot countenance this deprivation of due process. To remedy this violation of the plaintiffs' civil rights, this Court must not give retroactive effect to the Answer.

B. The Attempt to Amend Findings of Fact By the Federal Courts.

By ordering the Circuit Court of Montgomery County to certify its incomplete record in *Odom v. Bennett* to the Supreme Court, which in turn certified the record to the Eleventh Circuit, the Supreme Court deprived the parties of procedural due process.

> For more than a century the central meaning of procedural due process has been clear. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." ... It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." ...

Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (citation omitted). The Supreme Court ordered the certification one day before the release of the Answer, and the record certified to the Supreme Court was incomplete. (See exhibit G.) The order directed to the circuit court was entered and mailed to the Attorney General on

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[4] *See supra* at 15 (regarding the timing of the recusal motions).

March 13 but not received until March 16, two days after the release of the Answer. The Supreme Court considered as dispositive affidavits submitted by the *Odom* plaintiffs in support of their motion for summary judgment, but the circuit court had not even set a hearing of that motion. Furthermore, discovery was not complete, and the parties had not had an opportunity to cross-examine the *Odom* plaintiffs' witnesses. Summary judgment, therefore, would have been premature under Alabama law. *Tyler v. City of Enterprise*, 521 So. 2d 951 (Ala. 1988). The record, as developed in the last month, shows that these affidavits were misleading, deceptively prepared, and in one case false.

By considering the record from the circuit court and transmitting that record to the Eleventh Circuit, the Supreme Court violated well-established rules for certified questions. As that court stated in an opinion by Justice Almon released three days after the Answer, "the certified question procedure does not place this Court in a position of making factual findings." *Ericsson GE Mobile Communication v. Motorola Communications & Electronics*, no. 1931189, slip op., at 2 (Ala. March 17, 1995). The place for factual findings in this matter is the United States District Court for the Southern District of Alabama, and the evidence there, where all parties have been afforded an opportunity to cross-examine the witnesses, is undisputed.

The Supreme Court then used this incomplete record from a separate case as a basis for restating the question certified by the Eleventh Circuit. The Supreme Court stated that the question was whether Alabama law permits "some, but not all," of the contested absentee ballots to be counted. The record in this case, however, provides no basis for this restatement.

C. The Failure to Certify the Need for a Special Court.

Under Alabama law, disqualification or recusal of several members of the Supreme Court does not halt the judicial process. The Code of Alabama provides a remedy:

> When by reason of disqualification the number of judges competent to sit in a case is reduced to eight or to six and there is equal division among them on any question material to the determination of the case, the fact shall be certified by the chief justice or, when he is disqualified, by the judges sitting to the governor, who shall thereupon appoint a member of the bar of the supreme court to sit as a judge of said court in the determination of said case. Similarly, when by reason of disqualification no one of the judges is competent to sit in a case or the number is reduced below six, the fact shall be certified by the chief justice, if he is competent to sit, or, if not, by the judge or judges sitting, or, if no one is competent, by the clerk of the court to the governor, who shall thereupon appoint members of the bar of the supreme court to constitute a special court of seven members of the consideration and determination of such case.

Ala. Code § 12-2-14(1986). This statute *mandates* that when the number of justices falls below six a special court *shall* be appointed.

When only five justices voted in this case, the Supreme Court improperly evaded the mandate of section 12-2-14. The parties and the citizens of this State were entitled to the vote of each competent member of the court and the recusal of all others. If neither Justice Kennedy nor Justice Butts could sit on this case, then the statute applied. Instead, the Answer ignores this issue, except in the supplemental dissent of Justice Maddox. This failure to follow clear state rules also constitutes a denial of due process.

D. The Unauthorized Discussion of Federal Jurisdiction.

The question certified by the Eleventh Circuit was one of state, not federal, law. Indeed, the Constitution of Alabama limits the jurisdiction of the Supreme Court of Alabama "to answer questions of *state law* certified by a court of the United States." Ala. Const. amend. 328 § 6.02(b)(3)(added emphasis). Alabama Rule of Appellate Procedure 18(a) likewise provides that this process is confined to questions of Alabama law:

> When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of the *law of this State* which are determinative of said cause and there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal court may certify such questions or propositions of *law of this State* to the Supreme Court of Alabama for instructions concerning such questions or propositions of *state law* ....

Ala. R. App. P. 18(a) (added emphasis); *see also Tyler v. Insurance Co. of North America,* 520 F.2d 341, 342 (5th Cir. 1972)("Through certification we can have answers from the Court which under *Erie* has the last word....").

The Supreme Court had neither jurisdiction nor an invitation to address issues of federal law in this proceeding. *County of Westchester v. Commissioner of Transportation*, 9 F. 3d 242 (2d Cir. 1993)(federal court not bound by discussion of federal law by state supreme court). Although state courts often decide issues of federal law in other contexts, they have little or no role or expertise in determining issues of federal court jurisdiction. Strangely, the Supreme Court of Alabama ignored the lack of jurisdiction in the Circuit Court of Montgomery County, under section 17-15-6 of the Alabama Code. When the Supreme Court addressed issues of federal jurisdiction, it exceeded its own

jurisdiction, under the judicial article, and upset the delicate balance of federalism that has been respected by the federal courts in this matter. Throughout this controversy, the federal courts have confined their review to issues of federal constitutional law and the Voting Rights Act, while respectfully deferring to the state courts on issues of Alabama law, as required by Supreme Court precedent. *Government and Civic Employees Organizing Committee v. Windsor*, 353 U.S. 364 (1957).

When the Supreme Court addressed issues regarding federal jurisdiction, that court also failed to give the parties notice and an opportunity to be heard. The issues of federal jurisdiction were not briefed to that court. The first notice given to the parties that the court might address federal jurisdiction was in the Answer itself.

E. The Egregious Illogic of the Answer.

In the Answer, the Supreme Court failed to describe any ambiguity in section 17-10-7 and, as Justice Maddox explained, thereby violated the plain meaning rule:

> The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. *Advertiser v. Hobbie*, 474 So. 2d 93 (Ala. 1975); *League of Women Voters v. Renfro*, 292 Ala! 128, 290 So. 2d 167 (1974). If possible the intent of the legislature should be gathered from the language of the statute itself. *Advertiser v. Hobbie.* supra; Morgan *County Board of Education v. Alabama Public School and College Authority*, 362 So. 2d 850 (Ala. 1978)....

John Deere Co. v. Gamble, 523 So. 2d 95, 99-100 (Ala. 1988) (quoting *Clark v. Houston County Comm'n*, 507 So. 2d 902, 903-04 (Ala. 1987)). As Justice Maddox reasoned, with inescapable logic, there is no ambiguity in the language that the Legislature

used in section 17-10-7: "Each absentee ballot *shall* be accompanied by an envelope upon which *shall* be printed an *affidavit*.... Note: Your signature *must* be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older." Ala. Code §17-10-7 (added emphasis).

IV. Davis Has Not Identified "Special and Important" Reasons to Grant the Writ.

Supreme Court Rule 10.1 states that certiorari is strictly a matter "of judicial discretion." The rule also emphasizes, "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." The rule then outlines several such reasons, none of which are present here.

Davis has not identified any issue worthy of the review of this Court. Davis has not identified a direct conflict with a ruling of this Court, nor a conflict with decisions of federal Circuit Courts, nor a conflict with a holding of a state supreme court. The Eleventh Circuit explained persuasively why its decision is in harmony with the decisions of this and other federal courts, and the only issue before the Supreme Court of Alabama was one of state law. Any factual issues that remain have been remanded to the district court and can be reviewed by the Eleventh Circuit, if necessary.

CONCLUSION

This case is a tragic and embarrassing episode in the political history of the State of Alabama. The people of Alabama want this case resolved and the results of the election of the Chief Justice known. John Davis should end this litigation and concede that he cannot use state judicial processes to stuff the ballot box. The State defendants, however, urge the federal judiciary to continue exercising its duty to safeguard the civil rights of the voters of Alabama.

For the foregoing reasons, the erroneous Petition of John Davis should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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OF COUNSEL

APPENDIX A

§ 17-10-6 ABSENTEE VOTING § 17-10-7

§ 17-10-6. Form of absentee ballots.

The official ballots for any election to which this chapter pertains shall be in the same form as the official regular ballots for the election, except that they shall have printed thereon the words, "Official Absentee Ballot."

§ 17-10-7. Form of affidavit to be printed on envelope—General, special or municipal elections.

Each absentee ballot shall be accompanied by an envelope upon which shall be printed an affidavit. This affidavit which shall be used in general, special or municipal elections shall be substantially as follows:

"State of Alabama

"County of .....

"I, the undersigned, do swear (or affirm) that:

"(1) I am a resident of .....county in the state of Alabama.

"(2) My place of residence in Alabama is:

.....

(street)

....., Alabama ... .

(city or town) (zip code)

"(3) My voting precinct (or place where I vote) is:

.....

"(4) My date of birth is:.....

month day year

"(5) I am entitled to vote an absentee ballot because:

"Check only one:

_____ I have moved from Alabama less than thirty days prior to the election.

_____ I will be out of the county or the state on election day.

_____ I am physically incapacitated and will not be able to vote in person on election day.

"I further swear (or affirm) that I have not voted nor will I vote in person in the election to which this ballot pertains.

"I have marked the enclosed absentee ballot voluntarily and that I have read or had read to me and understand the instructions accompanying this ballot and that I have carefully complied with such instructions.

"Moreover, I further swear (or affirm) that all of the information given above is true and correct to the best of my knowledge and that I understand that by knowingly giving false information so as to vote illegally by absentee ballot that I shall be guilty of a misdemeanor which is punishable by a fine not to exceed $1,000.00 and/or confinement in the county jail for not more than six months.

.....

(Signature or mark of voter.)

"Note: Your signature must be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older.

"Sworn to and subscribed before me this.....day of..... 19..... I certify that the affiant is known (or made known) to me to be the identical party he claims to be.

..... (Signature of official)

(Title of official)

.....

(Address of official)

OR

"1st Witness.....

Signature

.....

Print name

.....

Address

.....

City Zip Code

"2nd Witness .....

Signature

.....

Print name

.....

Address

.....

City Zip Code"

APPENDIX B

Alabama Election Handbook

SIXTH EDITION

qualifications of each applicant.

In addition, the application contains an oath to support the United States Constitution and the Constitution of Alabama and a statement in the oath that the applicant disavows any belief or affiliation with any faction which advocates the over throw of the United States government or the State of Alabama by unlawful means. Under no circumstances is the applicant required to answer any question, written or oral, not related to his/her qualifications to register. If the applicant is unable to read or write, a member of the board or a deputy of the board must read to the applicant the application and the oath and the applicant's answers must likewise be written down by a board member or deputy. Such an applicant is considered registered upon meeting all other previously mentioned requirements [§17-4-122].

Absentee Ballots

A qualified voter who is either physically disabled from going to the polls or a qualified voter who is outside the county on election day may obtain an absentee ballot.

Any qualified voter falling within these two categories must file an application for a ballot in writing not less than 5 days prior to the election [See Appendix for Forms]. Such an application, which can be obtained from the absentee election manager, must include the applicant's name, address, and other information necessary to verify the applicant as a registered voter, and the address to which the ballot should be mailed. An applicant may request assistance in completing the application but must actually sign the form.

If the applicant signs by a mark, then the names of the witnesses to the signature must be included as well. The completed application can then be mailed or delivered to the absentee election manager [§17-10-3, §17-10-4 as amended]. The above provisions apply to both municipal and county elections [§ 17-

1-1]. Recent changes in Alabama election law provide that affidavits required for absentee ballots may be either notarized or witnessed by two individuals to validate the ballot [§§17-10-6, 7, and 8].

All persons voting by absentee ballot must have their ballots notarized by a notary public or anyone authorized to notarize documents or two witnesses 18 years of age or older. Otherwise, the ballot will not be counted.

Election Day

On the day of the election, voters vote. They may require assistance and all must follow certain procedures to vote.

Voting

On the day of election, voters desiring to vote must go to their appropriate voting precinct as it appears in the voting list published prior to the election.

Voters should pay special attention to these published voting lists for several reasons. Often precinct boundaries are changed for one reason or another (usually to keep all precincts equal in the number of prescribed voters) prior to elections. Hence, a voter who has voted in a particular location for many years may suddenly find he/she no longer votes in the same polling place but in an entirely new one.

Another reason for checking the voters' list is that the voting locations may vary as the type of election changes. For instance, voting precincts for municipal elections may be entirely different from those for non-municipal elections (i.e., county, state elections). Also it is a good idea to check the voting lists when they are published to ensure that the voter is properly listed and to enable him/her to correct any discrepancies should they exist.

Voting Assistance

Previously, voting assistance, under state law, was limited to those unable to read or write or to those physically incapable of making a cross mark on the ballot . However, the state law for providing such assistance was declared unconstitutional in 1988 by the United States District

Absentee Ballot Form

Applications need not be in any particular form, but they must include sufficient information to identify the applicant. An application for an absentee ballot must have the name of the applicant, the address of the applicant's place of residence, and the address to which the ballot is to be mailed [§17-10-4] (Check the appendix for a sample application).

Alabama law does not prohibit an individual from obtaining and distributing blank absentee ballot applications.

Delivery, Counting & Reporting Absentee Ballots

Each prospective absentee voter who meets the legal requirements is furnished an absentee ballot and two envelopes for returning the marked ballot by mail. One envelope is a plain envelope in which the voter's marked ballot is sealed. The second envelope must have the voter's affidavit printed on the back and be large enough to seal the plain envelope inside. This second envelope is to serve as a return mail envelope as well.

Upon receipt of the absentee ballot, the absentee election manager must record such on the absentee list and safely keep the ballots without breaking the seal of the affidavit envelope until election day. Beginning at noon of election day, the absentee election manager must deliver the sealed affidavit envelopes to the election officials. The elections officials then call the name of each voter casting an absentee ballot, review the affidavits to certify that each applicant is entitled to vote, then deposit the

envelope containing the ballot into the sealed ballot box to be counted and reported after the polls close [§ 17-10-10].

Generally, the cast of absentee election officials includes three managers, two clerks, and a returning officer. In the event a county has a population of greater than 50,000, the group of election officers as described above must be appointed for every 200 absentee ballots cast. However, in municipal elections held at a time other than the primary

Absentee Poll Workers

Absentee poll workers are appointed by the appointing board as are other poll workers. A complement of absentee poll workers consists of three managers, two clerks, and a returning officer. In counties of over 50,000 population there shall be one such group of poll workers for each 200 absentee ballots or fraction thereof [§ 17-10-11].

Absentee poll watchers may also be appointed just as the watchers are appointed [§ 17-10-11].

The task of absentee poll workers on election day falls into two phases. Beginning at noon (or later) they are to open the affidavit envelopes, review the affidavits, and deposit the plain envelopes in a sealed ballot box.

If, upon examination, the affidavit is not properly witnessed or notarized, is not signed by the voter, or does not otherwise contain sufficient information to determine that the person is a qualified elector and is entitled to vote absentee, the ballot should not be counted [Attorney General's opinion 80-00551]. Otherwise, the ballot should be deposited into a sealed ballot box.

If the absentee ballot is challenged but does not appear to be invalid on the face of the affidavit, the ballot should be counted; the affidavit, however, should be marked challenged with the basis of the challenge listed and turned over to the district

attorney for investigation [Attorney General's opinion 80-00551].

All applications and affidavits for an absentee ballot should be preserved in case of a contest or in the event that an investigation by the district attorney reveals evidence which would warrant some prosecutorial action [Attorney General's opinion 80-00551].

The second phase consists of opening the plain envelopes and counting the ballots. The procedure for absentee poll workers is generally the same as for poll workers in paper ballot counties and may not begin until the polls close.

APPENDIX C

80-00551

OFFICE OF THE ATTORNEY GENERAL

CHARLES A. GRADDICK
Attorney General
State of Alabama
Sept.12 1980

Honorable James E. Floyd
Clerk & Register of Circuit Court
P. O. Box 418
Carrollton, Alabama 35447

Pickens County - Elections — Absentee Voting
Absentee election manager should not accept an absentee ballot unless it is (1) mailed to him, or (2) hand delivered to him in person by the voter .
Discussion of procedure to be followed by absentee election manager where affidavit on absentee ballot is incorrect.
Opinion by Assistant Attorney General Breland

Dear Mr. Floyd:

This is in response to your request for an opinion from this office of July 28, 1980, regarding the proper procedure for returning absentee ballots.

Your first question is whether Section 5 of Act No. 80-732, which amends Section 17-10-9, *Code of Alabama 1975*, prohib-

its a second party from delivering an absentee ballot to the absentee ballot manager. My opinion is that it does. Section 5 of Act 80-732 states, in pertinent part:

"After marking the ballot and subscribing the oath herein required, the voter shall seal his ballot in the plain envelope provided, place that plain envelope inside the affidavit envelope, complete the affidavit, *and shall forward it by United States mail to the addressee or shall hand it to him in person.*" (Emphasis added)

According to this section, an absentee voter must either mail the ballot to the absentee election manager or deliver it in person. He cannot have another person deliver the ballot for him. This answers your second question, which is whether the absentee ballot manager can accept more than one ballot from any individual. Of course, if each person must either mail or hand deliver his own ballot, this would necessarily prohibit anyone from delivering more than one ballot. You should not accept more than one absentee ballot from any person.

Your last question is to ask what steps you should take if an affidavit is not correctly or fully made. Section 6 of Act 80-732 , which amends Section 17-10-10. *Code of Alabama 1975* , provide, in part:

> "Upon receipt of the absentee ballot, the absentee election manager shall record its receipt thereof on the absentee list as provided in 17-10-5 and shall safely keep the ballot without breaking the seal of the affidavit envelope. On the day of the election, beginning at 12:00 Noon, the absentee election manager shall deliver the sealed affidavit envelopes containing absentee ballots to the election officials provided for in section 17-10-11, and such election officials shall call the name of each voter casting an absentee ballot with poll watchers present as may be provided under the laws of Alabama and shall open each affidavit envelope,

review the affidavit to certify that such voter is entitled to vote and deposit the plain envelope containing the absentee ballot into a sealed ballot box."

This section indicates that the election officials are charged with the duty of reviewing the affidavits to certify that the voter is entitled to vote. If, upon examination, the affidavit obviously does not comply with Alabama laws that is, if it is not properly witnessed or notarized, is not signed by the voter, or does not otherwise contain sufficient information to determine that the person is a qualified elector and is entitled to vote absentee, the ballot should not be counted; otherwise, the ballot should be deposited into a sealed ballot box. If the absentee ballot is challenged but does not appear to be invalid on the face of the affidavit, the ballot should be counted The affidavit, however, should be marked challenged with the basis of the challenge listed and turned over to the District Attorney for investigation.

All applications and affidavits for an absentee ballot should be preserved in case of a contest or in the event that an investigation by the District Attorney reveals evidence which would warrant some prosecutorial action.

I hope that I have answered your question sufficiently. If this office can be of further help, please let me know.

Very truly yours,

/s/Charles A. Graddick

CHARLES A. GRADDICK
Attorney General

APPENDIX D

CV 94-PT-2816-M
Filed NOV. 18, 94 5:23 p.m.
U.S. DISTRICT COURT N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

RALPH E. BRADFORD, SR., individually as an African-American citizen of the State of Alabama, and on behalf of all other African-American citizens of the State of Alabama similarly situated;

PLAINTIFF,

v.

THE STATE OF ALABAMA; JAMES BENNETT, in his official capacity as Secretary of State for the State of Alabama; BOBBY JUNKINS, in his official capacity as Probate Judge of Etowah County, Alabama; JAMES HAYES, in his official capacity as Sheriff of Etowah County; BILLY S. YATES, in his official capacity as Circuit Clerk of Etowah County, Alabama,

DEFENDANTS.

AMENDED ORDER

At a hearing of plaintiff's motion for a temporary restraining order before a panel of three judges, the court has heard this matter and believes that the equities require immediate relief pending further hearing on this matter. In part, this court relies on the decision in *Turner v. Webster*, 637 F. Supp. 1087 (N.D. Ala. 1986) (3-judge panel) and Ala. Code § 17-10-7, and hereby **AMENDS** its order issued at 10:04 a.m. today.

WHEREFORE, this court hereby **ORDERS** and **DECREES** as follows:

1. The defendants and each member of the defendant class and their successors in office are hereby enjoined from counting absentee ballots that do not include a notarized signature or the signature of two witnesses if such ballots could have been counted subsequent to 5:00 p.m., November 15, 1994.

2. All defendants and all members of the defendant class and their successors in office are hereby enjoined from complying with or enforcing any order of the Circuit Court of Montgomery County, Alabama in *Odom v. Bennett*, No. CV 94-2434 (Montgomery Co. Cir. Ct.) which directs the counting of absentee ballots not notarized or properly witnessed pending the further orders of this court; and,

3. The Secretary of State is further enjoined from certifying any result from the November 8, 1994 election that could include the counting of any absentee ballots that do not include a notarized signature or the signature of two witnesses, if such ballots could have been counted after 5:00 p.m., November 15, 1994.

4. In addition, Judge Joe Phelps, Judge Eugene Reese and each other judge in the Montgomery County Circuit Court is hereby **ENJOINED** against the issuance and implementation of any order which provides for the counting of previously rejected or uncounted absentee ballots in the November 8, 1994 election, including but not limited to the order attached hereto, dated November 16, 1994.

5. Defendant Bennett is hereby **ENJOINED** to give notice of this order to the Circuit Court for Montgomery County, Alabama, and Circuit Judge Eugene Reese.

6. The court hereby **ORDERS** counsel for plaintiff to give oral notice of this order to the Montgomery County Circuit Court, and to Circuit Judge Gene Reese, and thereafter to expeditiously cause dissemination of this order or notice thereof to all defendants.

7. This Order is also binding upon the Democrat and Republican Parties, their officials, representatives and agents.

8. Plaintiff's counsel has certified to the court that additional efforts were made to contact Secretary of State Bennett after the filing of the complaint, and Mr. Bennett has been notified of the request for relief as well as the hearing set by the court for 12:00 noon on November 18, 1994.

9. The court requires a $1,000.00 cash bond which has been posted.

10. The hearing on the motion for preliminary injunction is hereby consolidated with the hearing on the merits, as agreed by the parties, and such hearing shall begin at 9:00 a.m., Tuesday, November 22, 1994, and proceed at such other times as may be appropriate.

DONE and **ORDERED** this 18th day of November, 1994.

/s/Robert B. Propst
ROBERT B. PROPST

UNITED STATES DISTRICT JUDGE

Case No. CV-94-2434

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, ALABAMA

MICHAEL LEWIS ODOM, and JOHN W. DAVIS on behalf of themselves and others similarly situated,

Plaintiffs,

v.

JIM BENNETT, WALKER HOBBIE, JR. DEBBIE HACKETT, and DAN JONES, in their official capacities,

Defendants.

ORDER

Based upon the complaint filed in this case, sworn testimony and other evidence, this Court hereby issues the following Order in accordance with the Law, evidence and the relief sought. The named Defendants and all members of the Defendant class are hereby instructed to recount the absentee ballots cast in the November 8, 1994, election for all candidates in each of Alabama's counties. The ballots will be counted in accordance with the criteria set out in the Supreme Court of Alabama opinion styled *William v. Lide*, 628 So.2d 531 (Ala. 1993). In accordance with *Williams v. Lide*, those persons counting the absentee ballots for each county shall count each ballot which contains: (1) the place of residence of the person casting the ballot; (2) the reason for the vote or voting absentee ballot; and, (3) the signature of the voter. Absentee ballots may not be excluded from being counted because of a lack of notarization or a lack of witnesses.

For purpose of this Order, the Court finds that this action is an appropriate one for class action treatment both for the Plaintiff class as defined in the Complaint and for the Defendant class as defined in the Complaint. For purposes of clarification, the Defendant class is defined so as to include the probate judges, circuit clerks, and sheriffs of all sixty-seven counties in the State of Alabama. Where any of those three officers was a candidate for election on November 8, 1994, and was therefore excluded from serving as an election supervisor then the person who took that office-holder's place is a member of the Defendant class and is subject to this Order and the injunction contained herein.

The Defendant class is enjoined to complete the recounting of the absentee ballots, and the amendment to the certification of election results instanter. The election officials, County Board of Supervisors, the Absentee Box Manager, and the absentee box vote counters of each county shall expeditiously convene and count the previously rejected ballots in accordance with this Order. After the appropriate persons shall have counted the ballots, each respective county shall forward to the Secretary of State a separate certification of votes which contains solely the previous rejected absentee ballots.

Because of the urgency of this cause, it is further Ordered that the Judge of Probate of each county shall forthwith be served a copy of this Order by the Circuit Clerk of this court by facsimile and the terms and conditions herein be implemented forthwith by Defendants and Defendant class.

The Court directs that the amended certifications be delivered to the Secretary of State by a deputy sheriff or an election official from each of the sixty-seven counties covered by the scope of this Order.

Further, Defendant Bennett is enjoined from certifying and/or compiling vote totals in all races until the recounting of the absentee ballots has been effected and until he has received all of

the amended recertifications reflecting the recounting of the absentee ballots. At the time Defendant Bennett receives all of the amended recertifications, then Defendant Bennett shall certify the election results in all races.

The Circuit Clerk shall proceed forthwith by facsimile or other means to provide a copy of this Order upon Defendants and Defendant class.

DONE this the 16 day of November, 1994.

/s/Eugene W. Reese
EUGENE W. REESE
Circuit court Judge

APPENDIX E

CV 94-PT-2816-M
Filed Nov 25, 1994; 9:25 a.m.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

RALPH E. BRADFORD, SR., individually as an African-American citizen of the State of Alabama, and on behalf of all other African-American citizens of the State of Alabama similarly situated;

PLAINTIFF,

v.

THE STATE OF ALABAMA; JAMES BENNETT, in his official capacity as Secretary of State for the State of Alabama; BOBBY JUNKINS, in his official capacity as Probate Judge of Etowah County, Alabama; JAMES HAYES, in his official capacity as Sheriff of Etowah County; BILLY S. YATES, in his official capacity as Circuit Clerk of Etowah County, Alabama,

DEFENDANTS,

MICHAEL LEWIS ODOM and JOHN W. DAVIS,

INTERVENORS-DEFENDANTS.

MEMORANDUM OPINION

As the judge to whom this case was initially assigned, and as the sole judge who issued the temporary restraining order, as amended, which was issued on November 18, 1994, this judge further addresses his reasons for voting to dissolve the temporary restraining order and to deny the application for preliminary

injunction. This judge makes no suggestion that his opinion is or is not that of the other two judges assigned to the three judge panel by the Chief Judge of the Eleventh Circuit Court of Appeals.[1]

There may be some misunderstanding as to the role of this court. The sole issue before this court on November 18, 1994 was framed by the plaintiff(s)' complaint wherein it was alleged that,

> The order of the Circuit Court of Montgomery County, Alabama hereinabove described brought about and will bring about changes to the voting standards, practices, or procedures in place on the effective date of the Voting Rights Act of 1965 affecting the election of candidates for office in Alabama which were required to be precleared under Section 5 of the Voting Rights Act of 1965.
>
> The execution and implementation [of] said orders without first obtaining the approval of the United States Attorney General violate Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

On November 18, 1994, this judge preliminarily concluded that the order of the Circuit Court of Montgomery County, Alabama clearly brought about and will bring about changes to

---

[1]As this judge made plain at the hearing on November 22, the decision of this court to dissolve its own restraining order had no effect on, nor did it conflict with, the ruling of any other court, state or federal. The three-judge panel in this case sat as a trial court, not an appellate court. To this judge's knowledge the action in this case was the only pending case which addressed § 5 of the Voting Rights Act. That was the only federal law addressed by this court. The attorneys, of course, were well aware of the foregoing. Their clients should have had no misunderstanding.

voting standards, practices or procedures. With regard to absentee ballot affidavits, § 17-10-7, provides "Your signature *must* be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older." (Emphasis added).[2] This court respectfully disagrees with a conclusion that an "affidavit" which does not include either of the prescribed attestations "substantially complies" with the statute. Further, this judge does not agree that *Williams v. Lide*, 628 So. 2d 531 (Ala. 1993) so holds. Further, there was no evidence that *Williams v. Lide* itself had been precleared prior to November 8, 1994.

This judge, having determined that the Montgomery County Circuit Court order constituted, in midstream, a change in voting procedures, had only one other issue to address on November 18, 1994. That issue was whether, at the time of the filing of this action, approval of the change had been obtained from the United States Attorney General. It is undisputed that, at that time, it had not been. Based on these two findings and conclusions, this judge issued the final temporary restraining order, as amended, after notice and hearing. The court set November 22, 1994 as a date for the three judge panel to consider the application for preliminary injunction. See 28 U.S.C. § 2284(b) (3).

Early in the morning of November 22, 1994, the Office of the Attorney General of the United States issued a letter which purportedly stated that the Attorney General interposed no objection to the change created by the order of the Circuit Court of Montgomery, Alabama. The letter did not specifically mention the order of said state circuit court. Neither did the letter refer to any basis for a determination that the change is free of

---

[2]It is not clear who represented the voters of Alabama in said case. Of course, the same question might be asked concerning this case.

discriminatory purpose and effect or that such a decision had been specifically made.[3] Apparently, this "determination" was made quickly and in a conclusory fashion, based upon "evidence" from sources of which this court is unaware. This court can quickly think of several possible reasons for concluding that the change is not free of discriminatory purpose and effect. First, the change was made in midstream after a preliminary count had been completed and reported to the Secretary of State of Alabama. Such a "wait and see" approach could clearly suggest discriminatory purpose and effect. Second, the new rule, having been announced *after* the election, was patently discriminatory as to those potential voters who may have felt that they would have to comply with the seemingly stringent requirements of § 17-10-7 in order to vote an absentee ballot.

It is undisputed that the current instructions of the Secretary of State and an earlier opinion of the Attorney General of Alabama had clearly required compliance with the notary or witness provision of § 17-10-7.[4] The foregoing, coupled with the common knowledge that absentee ballots have been historically an area fraught with the potential for fraudulent abuse, suggests the potential for discrimination. The cases which this judge has read suggest that the purpose of the subject statutory provision

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[3]28 CFR Ch 1 (7-1-94 Edition) Subpart F, which prescribes the standards applicable to "Determinations by the Attorney General" includes the following at § 51.52(c).

> (c)*Objection.* An objection shall be interposed to a submitted change if the Attorney General is unable to determine that the change is free of discriminatory purpose and effect. This includes those situations where the evidence as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that the change is free of discriminatory purpose and effect.

[4]*See Henderson v. Graddick*, 641 F. Supp. 1192 (M.D. Ala. 1986) for a discussion of the effect of action of the Attorney General of the State of Alabama with regard to election procedures.

is to protect the integrity of the ballot. It is obvious that the lack of such a requirement lends itself to misleading, intimidation, or even forgery.[5] The legislative desire to protect the integrity of such ballots is commendable.

Notwithstanding the foregoing, this court is bound by the "determination" of the United States Justice Department which some, perhaps, would commend for its prompt action.[6] In *Morris v. Gressette*, 432 U.S. 491, 507 (1977), the United Supreme Court stated,

> Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation. But it cannot be questioned in a suit seeking judicial review of the Attorney General's exercise of discretion under § 5, or [her] failure to object within the statutory period.

Further,

> For the reasons stated in the text, we think Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act.

---

[5]Plaintiff(s)' First Amended Complaint has an attached statement from a voter who says that she was not allowed to vote personally in the November 8, 1994 election because she "had already voted absentee." The declarant states that she had not voted absentee. There are other declarations concerning voting by dead people, non-residents, etc.

[6]The response of the Office of the Attorney General to the court's request for clarification removed doubt as to the intent of that Office. Curiously, the initial letter suggests that possible previous non-precleared violations, on a county by county basis, of the apparently precleared Alabama statute created a situation whereby present adherence to the statute would have to be precleared.

Id. 432 U.S. at 507, n. 24.[7]

The § 5 determination of the Attorney General having been received, this judge had no choice other than to vote to dissolve the temporary restraining order. Regardless of whether this judge may be personally repulsed by the circumstances pertinent to this case, this judge's respect for the law as an institution prohibits his abusing his authority even in an attempt to remedy

---

[7]In dissent, Justice Marshall (Justice Brennan concurring) stated,

> Under the Court's ruling, it matters not whether the Attorney General fails to object because he misunderstands his legal duty, as in this case; because he loses the submission; or because he seeks to subvert the Voting Rights Act. Indeed, the Court today grants unreviewable discretion to a future Attorney General to bargain acquiescence in a discriminatory change in a covered State's voting laws in return for the State's electoral votes. Cf. J. Randall & D. Donald, The Civil War and Reconstruction 678-701 (2d ed. 1961) (settlement of the election of 1876).
>
> Common sense proclaims the error of this result. It is simply implausible that Congress, which devoted unusual attention to this Act in recognition of its stringency and importance, see *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09. . . (1966), intended to allow the Act's primary enforcement mechanism to be vitiated at the whim of an Attorney General. Legal analysis supports the conclusion that congress did no such thing. But today, the majority puts aside both common sense and legal analysis, relying instead on fiat. I dissent.

(footnote omitted). *Id.*, 432 U.S. at 507.

Justice Hugo Black's dissent in *South Carolina v. Katzenbach*, 383 U.S. 301, 355-362 (1966) also questioned the delegation of such authority to the Attorney General of the United Stated under § 5.

other perceived abuses.[8] A Justice of the Supreme Court of the United States recently expressed his concern about the deterioration of the law as an institution. This judge will not contribute to any such decline.

This 25th day of November, 1994.

/s/ Robert B. Propst

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

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[8]This court has neither officially approved nor officially disapproved the determination of the Attorney General of the United States nor the order or ruling of any other court, state or federal.

APPENDIX F

Filed, March 17,

Clerk Supreme Court of Alabama

Judicial Inquiry Commission
800 South McDonough Street
Montgomery, Alabama 36104
March 17, 1995

The Honorable Terry L. Butts
Associate Justice
Alabama Supreme Court
300 Dexter Avenue
Montgomery, Alabama 36104

Dear Justice Butts:

The Judicial Inquiry Commission* has considered your request for an opinion concerning whether your disqualification is required in *Roe v. Boggan,* Case No. 1940461, the case of the certified question from the Eleventh Circuit United States Court of Appeals regarding Alabama law on the counting of absentee ballots in the 1994 general election in which the election of Alabama's Chief Justice is at issue. You specifically asked whether an associate justice "impartiality might reasonably be questioned", thus requiring disqualification under Canon 3C(1), due to any of the following circumstances:

1. You were a candidate for the position of Associate Justice in the election at issue and were elected;

---

*Justice Kennedy did not participate in the rendition of this Opinion.

2. You appeared on platforms with the incumbent Chief Justice at the same political forums, where you and he sought and received political endorsements from the same groups;

3. You and the incumbent Chief Justice shared and used some of the same advertising and media consultants, polling data, and other campaign personnel;

4. You and the incumbent Chief Justice are members of the same political party;

5. You received a campaign contribution from the incumbent Chief Justice's attorney son;

6. You received a campaign contribution from the law firm in which the incumbent Chief Justice's son is a partner;

7. You received campaign contributions from law firms that are representing a class of plaintiffs in a lawsuit closely related to *Roe v. Boggan.* These firms also contributed to the incumbent Chief Justice's campaign; and

8. The ruling on the certified question, and the effect it may have on the disposition of *Roe v. Boggan,* could affect the final vote totals in your 1994 election. However, it should not affect the outcome.

While your request for an advisory opinion was under consideration by the Commission, the Supreme Court of Alabama, on March 14, 1995, entered it's decision in the above referenced case. In that decision, the Supreme Court ruled that disqualification was not required. However, since further proceedings may occur in this case, your request is not moot.

It is the opinion of this Commission, in response to your request, that based upon the decision of the Supreme Court, on March 14, 1995, you are not disqualified. However, it is the recommendation of the Commission that you should recuse yourself from any

future participation in the above referenced case. The Commission bases its recommendation on the totality of the circumstances with special focus on the apparent interrelationship of your campaign with that of the incumbent Chief Justice. The Commission views recusal as especially appropriate not only due to the above factors but also because of the climate surrounding the 1994 Alabama elections. See Canons 1, 2A, 2C, 3C(1)(a), (c), and (d), and 7A(1).

The Commission does not suggest that you are actually biased, nor does it question your representation that you are able to render impartial judgment in the case at issue. However, the reasonable persons/appearance of impropriety standard in Canon 3C(1), along with the other canons, provides a basis for this recommendation. As the Supreme Court of Alabama has stated previously:

> The appearance of fairness is virtually as important as is fairness itself. One of the essential ingredients of an effective judiciary is the high level of respect accorded it by the citizenry. Except for the impartiality of those who occupy the role of judge, both in act and appearance, the level of respect necessary to a strong and effective judiciary will fail. It is the essence of the system that any position of interest or bias is sufficient cause for disqualification of the judge, and the right to raise and insist upon the causes of disqualification must be zealously guarded.

Morgan County Commission v. Powell, 293 So. 2d 830, 840 (Ala. 1974).

Sincerely,

/s/ Braxton L. Kittrell, Jr.

BRAXTON L. KITTRELL, JR.
Chairman

APPENDIX G

1940461

IN THE SUPREME COURT OF ALABAMA

March 13, 1995

Larry Roe, et al. v. Mobile County Appointing Board, et al., (9407138); Larry Roe, et al. v. State of Alabama, by and through its Attorney General James Evans, et al., (94-7155).

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ORDER

This Court has consented to answer the question certified by the United States Court of Appeals for the Eleventh Circuit, Larry Roe, et al. v. Mobile County Appointing Board, et al., (9407138); Larry Roe, et al. v. State of Alabama, by and through its Attorney General James Evans, et al., (94-7155).

This Court has determined, upon a consideration of the certified question and the materials submitted thereon, that a complete and reasoned answer to the certified question requires the record in *Odom v. Bennett* (Michael Lewis Odom and John W. Davis v. Jim Bennett, Walker Hobbie, Jr., Debbie Hackett, and Dan Jones (CV 94-2434)) to be before this Court. The Montgomery County Circuit Court, Eugene W. Reese, J., issued an injunction in *Odom v. Bennett* in November 1994, but no appeal was taken. Due to the gravity of the situation involved in *Odom v. Bennett* and *Roe v. Mobile County Appointing Board,* and due to the time constraints caused by the ongoing delay in certifying the results of the November general election, the Supreme Court of Alabama hereby exercises its supervisory jurisdiction to order the Circuit Clerk of Montgomery County, Alabama, to certify a copy of the record in *Odom v. Bennett* to this Court.

IT IS THEREFORE ORDERED, that the Circuit Clerk of Montgomery County, Alabama, certify a copy of the record in *Odom v. Bennett* (CV 94-2434) and forward the same to the Clerk of the Supreme Court of Alabama *instanter*.

Almon, Shores, Ingram, and Cook, JJ., concur.

Maddox, J., dissents.

Hornsby, C.J., and Houston, J., recused.

Robert G. Esdale, as Clerk of the Supreme Court Alabama, do herby certify that the foregoing is full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said court.

Witness my hand this 13th day of March, 1995

/s/ Robert G Esdale
ROBERT G. ESDALE
Clerk, Supreme Court of Alabama

Supreme Court, U.S.
FILED
AUG 16 1995
CLERK

NO. 95-64

IN THE

Supreme Court Of The United States

OCTOBER TERM 1994

JOHN DAVIS, on behalf of himself and all others similarly situated,

Petitioners,

v.

STATE OF ALABAMA, PERRY O. HOOPER, SR., LARRY ROE, JAMES D. MARTIN, AND ALL ALABAMA PROBATE JUDGES, SHERIFFS, AND COUNTY CLERKS IN THEIR OFFICIAL CAPACITIES, *et al.*,

Respondents.

BRIEF IN OPPOSITION BY RESPONDENTS LARRY ROE, PERRY O. HOOPER, SR. AND JAMES D. MARTIN

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August 14, 1995

BEST AVAILABLE COPY

54 pp

QUESTIONS PRESENTED

1. Is there a right under the Fourteenth Amendment to prevent State election officials from systematically altering past election practices after voting is completed to include absentee ballots normally rejected?

2. Does a federal district court lose jurisdiction under the *Rooker-Feldman* doctrine over the claims of a class of voters, presented by persons affiliated with one political party, where a State court issues an order against the political party?

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STATEMENT OF THE CASE

A. Introduction

This case seeks review of an interlocutory order of the U.S. District court for the Southern District of Alabama. The decision was affirmed by the Eleventh Circuit, which attempted to utilize the certified question process to obtain guidance from the Alabama Supreme Court on the meaning of an Alabama statute.

Petitioner Davis has been to a Justice of this Court once before on this same case seeking a stay of proceedings in the District Court in May 1995. That request was denied.

The case remains pending in the District Court, with discovery complete (except for an effort by Petitioner Davis to obtain mandamus relief from the Eleventh Circuit). Trial is scheduled for September 19. As one would expect, discovery has produced a great deal of additional information relevant to the case, however, because it is not part of the record in this case, it is not referenced here.

B. Statement of Facts and Course of Proceedings in the Lower Courts.

Respondents believe there is a need to correct inaccuracies and omissions contained in Petitioner's Statement of the Facts. In fact, Petitioner's statement is significantly argumentative, and we respond here (rather than in some other section) to facilitate comprehension of the conflicting perspectives.

1. This litigation began in federal court to assure that records were preserved for state law election contests in the Chief Justice's and Treasurer's races.

It is wrong to suggest that the procedural history of this case began in the Circuit Court of Montgomery

County, Alabama. This case began in the U.S. District Court in Mobile, Alabama, on November 16 with the filing of an application for temporary restraining order to require preservation of election records for use in a state election contest. The Plaintiffs included Perry Hooper, Sr. and James D. Martin, Republican candidates for Chief Justice and Treasurer,[1] respectively, who had sought a similar order the week before in the Circuit Court of Shelby County, Alabama. Though Hooper and Martin had obtained an order from the Shelby County court, it had been ignored by many state election officials.

Furthermore, an Alabama statute strips the state courts of jurisdiction "to entertain any proceeding for ascertaining the legality, conduct, or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute . . . ." *Ala. Code* § 17-15-6 (1987). The *statute* also directs state officials not to comply with any order of this kind from a court. *Id.*

When Plaintiffs' filing occurred in federal court on November 16, 1994, in addition to Hooper and Martin, Larry Roe was a Plaintiff. They sought relief on behalf of a class of qualified voters seeking to protect their right to vote under the U.S. Constitution. The class was not identified as limited to persons of any political party. Plaintiffs requested preservation of election records, including the absentee ballot records. R1-1-1. The Defendants were state election officials. Petitioner Davis was not a party, and counsel did not include any attorney of the Republican Party.

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[1]Plaintiffs disagree with footnote five of the Petition. It is not undisputed who is due to be Treasurer. As of this writing, on the record before the courts below, Martin could win if the absentee ballots were in his favor sufficiently. There is nothing in the record about who the Governor appointed when the term of the previous Treasurer expired, or why he acted as he did.

Later the same day, Petitioner John Davis filed an action in the Circuit Court of Montgomery County, Alabama, under the style *Odom v. Bennett,* No. 94-2434-R (15th Jud. Cir., Ala. Nov. 16, 1994). He sought relief on alleged state law grounds against the Secretary of State and state election officials for their practice of refusing to accept for counting certain absentee ballots — those contained in "affidavit envelopes" which were not witnessed by two persons or not notarized. In essence, he claimed that the notary/witness provision of *Ala. Code* § 17-10-7 (1987) were not mandatory.

The Republican Party was not named as a defendant by Davis. Similarly, Hooper, Martin, and Roe were not named as defendants.

The federal court announced from the bench its intention to enter relief on the afternoon of November 17, after hearing live testimony from persons who had observed the state of election records preservation. In addition, there was testimony that at least some election officials had refused to allow challenges to absentee voters, and these officials had separated absentee ballots from their "affidavit envelopes."

Within hours after the District Court's hearing was concluded, on November 17, Davis obtained a hearing in his state court action. That evening, the state court ordered unwitnessed, unnotarized absentee ballots counted in supplemental fashion and thereby undertook to change the electoral results. The Republican Party intervened in that proceeding using the counsel of Algert S. Agricola, Jr., who was *not* at that time counsel in the pending federal action. Agricola participated in the hearing convened by the state court on the evening of November 17, even though the Republican Party filed no pleading.

On November 18, the District Court issued its first written order. The order directed county election officials to

preserve election records intact, and further specifically ordered the Defendants to refrain from altering any absentee ballots, related affidavits or certification of results. R1-5-4. The relief was ordered statewide because of the potential effect on the Chief Justice's and Treasurer's elections of loss, destruction or alteration of records by *any* county. A hearing was set on the motion for preliminary injunction for December 5. R2-139-40, 145, R3-172-73. At this point, Secretary of State Bennett was not a party in the U.S. District Court.

Despite the November 18 order of the District Court, election officials in at least 30 counties undertook to count the defective absentee ballots and change their certifications of results. App. at 22a n.7; R3-55-56 (Bennett). These results were transmitted to Bennett, whose responsibility it is to certify elections of state officials. *See Ala. Code* § 17-14-20 (1987).

On November 23, these supplemental county certifications came to the attention of the District Court, and the judge notified Bennett by telephone that he must not certify any results using absentee vote totals altered by county officials pursuant to the Montgomery action. R3-74 (Bennett). A written order amending the court's prior temporary restraining order was issued later on November 23. R1-8-1. The amended order specifically gave Bennett notice of the prior order and directed him not to use altered certifications from county officials in certifying results. It also enjoined him not to certify the results of the Chief Justice's election or the Treasurer's election pending the December 5 hearing on the motion for preliminary injunction. R1-8-1.

Later on November 28, Mr. Agricola, counsel for the Republican Party, entered an appearance on behalf of Hooper, Martin and Roe in U.S. District Court. R1-19-1. He did not appear on behalf of the Republican Party.

On November 28, Plaintiffs amended their Complaint to allege claims against Bennett, in his official capacity, and to seek preliminary injunctive relief against him directly. R1-9-3. Petitioner Davis was also added as a party defendant and as the class representative for the same class of persons on whose behalf he had brought the Montgomery action, *Odom v. Bennett*. R1-9-3.

The Amended Complaint elaborated on the factual grounds for relief based on violations of the U.S. Constitution. Among other things, Plaintiffs asserted that the post-election change in practices for defective "affidavit envelopes" would cause their votes to be diluted by absentee ballots, not previously considered qualified, in election results in violation of the First and Fourteenth Amendments. Plaintiffs sought an order prohibiting the counting of those ballots by any of the Defendants and prohibiting the inclusion of them in any certification of results issued by Bennett.

2. *The evidence at the December 5 hearing showed without dispute that unwitnessed, unnotarized absentee ballots had not been counted under state practice prior to the post-election state court order.*

At the December 5 hearing, there was substantial, undisputed evidence of the State's longstanding, statewide practice as to the rejection of unnotarized, unwitnessed ballots.

Plaintiffs presented the testimony of Secretary of State Bennett and his *1994 Election Handbook* (6th ed.) made available to election officials throughout the State's 67 counties. The handbook described standard election practice for disqualifying certain absentee ballots in unnotarized, unwitnessed affidavit envelopes:

> The task of absentee poll workers on election day falls into two phases. Beginning at noon (or

> later) they are to open the affidavit envelopes, review the affidavits, and deposit the plain envelopes in a sealed ballot box.
>
> *If, upon examination, the affidavit is not properly witnessed or notarized,* is not signed by the voter, or does not otherwise contain sufficient information to determine that the person is a qualified elector and is entitled to vote absentee, *the ballot should not be counted* [Attorney General's opinion 80-00551]. Otherwise, the ballot should be deposited into a sealed ballot box.

R3-51-53, PX 8. (emphasis added).

The Attorney General's opinion which is cited described the same practice included in the *1994 Election Handbook.* R3-50, PX 7. Indeed, the words are nearly verbatim the same:

> If, upon examination, the affidavit obviously does not comply with Alabama law; that is, if it is not properly witnessed or notarized, is not signed by the voter, or does not otherwise contain sufficient information to determine that the person is a qualified elector and is entitled to vote absentee, the ballot should not be counted. Otherwise, the ballot should be deposited into a sealed ballot box.

Id., Ex. 7 at 3.

Bennett testified that "until the Circuit Court ruled in Montgomery," his office relied on the 1980 Attorney General opinion relating to the noncounting of absentee ballots accompanying defective affidavits. R3-51. Bennett also testified that it was his "understanding that ballots that are not witnessed by two people over the age of 18 or notarized are not counted prior to the Montgomery County Court case." R3-54.

Also introduced into evidence at the December 5 hearing was the testimony, from the Montgomery County ac-

tion, of Vicki Balough, an election analyst for the Secretary of State for the last six years. R3-162, DX 1, R-69 to 73. Balough explained that, during the tenure of the most recent three Secretaries of State, the State has given instructions to local election officials "not to count [absentee ballots] votes where there was no notary or two witnesses." *Id.*, R-70-71, 73.[2]

Particular county officers, poll officials or poll workers corroborated this testimony about past practice involving absentee ballots. R3-153-55 (Huffman, Bullock County); R3-89-90 (McEarchern, Mobile County); R3-95-96 (Mason, Greene County); R3-162, DX 1 (R-38 to R-39, Hackett, Montgomery County); R3-105-06 (Grods, Wilcox County).

Davis introduced as evidence the entire record in *Odom v. Bennett,* which he had filed three weeks earlier, and in which he had introduced evidence of a need for temporary relief to require inclusion of unwitnessed absentee ballots.

Based on this evidence, the District Court made findings that past practice of state officials was (i) not to count unwitnessed, unnotarized absentee ballots, and (ii) not to certify election results using such ballots. The court also found that the Secretary of State was under an order from the state court in *Odom v. Bennett* to include

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[2]Obviously, the purpose of the requirement that absentee ballots be notarized or witnessed is the prevention of fraud and promotion of the integrity of the election. R3-61-63 (Bennett). The Court received further testimony from Bennett that absentee ballots exceeding 6% to 7% of the total votes cast was an alarming total. R3-60-61 (Bennett). In one county, Greene, approximately 33% of the votes cast were from absentee voters. R3-61 (Bennett). To place these percentages in proper perspective, it should be explained that Alabama restricted absentee voting only to those who were out of the country on election day or were sick or otherwise physically unable to go to the polls. *Ala. Code* § 17-10-3 (1987).

such ballots in certifying election results. App. at 164a. The District Court's conclusions of law were grounded on interpretation of the First Amendment and the Fourteenth Amendment's Due Process Clause; despite what Petitioner writes, at 7, there was no reference to a right to disenfranchise Davis in the District Court's conclusion. In one very real sense, the evidence showed that Davis disenfranchised himself by not following a clearly established and long-followed rule and practice for absentee voting. The District Court order related only to the certification of results, which determined who takes office pending the resolution of any "contest" in the legislature pursuant to *Ala. Code* § 17-15-50 (1987).[3]

The District Court found that the harm suffered by the Plaintiffs would be irreparable. If the disputed absentee ballots were counted, they would be separated from their accompanying affidavit envelopes, and mixed with the "ocean" of regularly counted ballots. In such condition, the ballot is not identified with a particular affidavit envelope, and secrecy is preserved. *See Ala. Code* § 17-10-10 (1987). However, there would be no way to purge the

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[3]At this point in the presentation of the evidence, there was no indication one way or the other whether the absentee ballot of anyone other than Davis reflects the vote of a real, living citizen, and whether any of the ballots are otherwise fraudulent. However, so many absentee ballots were cast in Greene County (33% of the vote total) there are serious questions about whether ballots there are fraudulent. App. at 26a n.13. The record contains testimony about the absentee ballot of a comatose nursing home patient, R.122-28, and of a Bullock County voting rights activist, who attributes the rise in absentee voting, in recent years, to fraud. Despite the Davis class claim, Petition at 7, there is evidence that would justify the conclusion of actual fraud, although the claim for relief on which the Court of Appeals premised its holding does not depend on such a conclusion, but instead on a conclusion that the *Odom* order would work a patently unfair, retroactive change in election practices after the election was over.

votes on these ballots once they were included in certified totals. The Davis Class ballots were not shown to suffer any similar harm by remaining uncounted pending any election contest, and thus the secrecy of votes contained in those ballots would remain intact. The District Court's preliminary injunction thus preserved this existing *status quo*. App. at 166a-167a.

By agreement, the District Court's order preserving election records was allowed to remain in place. R2-167-168.

3. The Eleventh Circuit proceeding affirms the District Court's order but refused to allow an order requiring results be certified, pending trial on the merits.

Petitioner Davis attempted, on appeal, to include evidentiary materials not before the District Court on December 5. These materials suggested that, in two Alabama counties, during November 1994, officials had not followed the past practice of refusing to count unwitnessed, unnotarized absentee ballots.

The Eleventh Circuit affirmed, but modified the relief by directing no certification of results in the Chief Justice's or the Treasurer's race in the preliminary injunction. App. at 32a. The panel was unpersuaded that any factual dispute existed as to liability on the record before the District Court. The panel noted that, four days after the District Court's preliminary injunction, the Montgomery state court amplified its prior TRO by elaborating on its reasons for the November 17 order and determining that it had jurisdiction despite the bar of *Ala. Code* § 17-15-6. App. at 21a n.9.

The Eleventh Circuit believed that Section 17-10-7 required, on its face, notarization or witnessing, but certified a question of state law to the Alabama Supreme Court to determine whether its reading was correct, in

light of the *Odom v. Bennett* decision. The court was reluctant to reach a final decision when the proper application was muddled, and a "reasonable alternative course of action exists." App. at 29a. Plaintiffs objected to certification, citing, among other things, the obvious difficulties of a court ruling on a case with such a direct impact on one of its own members. *See also, Ex parte Alabama Power Co.*, 280 Ala. 586, 196 So. 2d 702 (1967).

4. The Alabama Supreme Court Justices' response to the certified question criticizes the Eleventh Circuit, and attempts to alter the record facts.

Petitioner gives only a short discussion to the opinion from the justices in response to the certified question. Petition at 10. There are significant omissions here as well, and they seem important.

In responding to the certified question, only five of nine justices of the Alabama Supreme Court participated. Two recused, App. at 102a-111a, two gave no indication of participating, only four comprised the decision-makers, App. at 102a, App. at 112a, 194a, and one dissented.

Plaintiffs objected to any of the remaining justices who had contributed financially to the campaign of the Chief Justice, and not his opponent Plaintiff Perry O. Hooper, Sr., during the last weeks of the campaign. Plaintiff claimed that three of the remaining five were so involved, and that a fourth justice was a campaigner with the Chief Justice in the November election. Accordingly, *Ala. Code* § 12-2-14 (1987) required appointment of a special court by the Governor. These four justices rejected the motion to disqualify or recuse and refused to allow appointment of a special court; they advised that the contributions "reflect collegial courtesy expressed in a time before this controversy arose." App. at 102a.

Plaintiffs also explicitly reserved adjudication of federal constitutional questions for the federal courts. However, not only did the Alabama justices respond to the certified question, they also nevertheless issued opinions about the federal issues, and relied on additional affidavits not before the Eleventh Circuit. The justices obtained the affidavits by a unilateral order to the state circuit court in *Odom v. Bennett* to transmit them, as there was no appeal filed by anyone in that case. The affidavits were apparently filed in the state court largely *after* the Eleventh Circuit issued its January 1995 opinion. App. at 69a & n.12.

As for the federal issues addressed, the Alabama justices told the Eleventh Circuit that it had decided the *Rooker-Feldman* issue incorrectly. App. at 64a. The Alabama justices said that the Republican Party was the same as the Plaintiffs in the District Court because some of the Plaintiffs were candidates of that party and pointed to the fact that one of the lawyers was the same as the lawyer for the Republican Party. App. at 64a. The Eleventh Circuit was also criticized at length for intervening in what the Alabama justices chose to characterize as a "garden variety" election dispute concerning the marking of ballots, which is reserved for state election contest tribunals. App. at 55a-64a.

Justice Maddox dissented at length. App. at 112a-135a. He explained that Alabama statutes on absentee voting were clear on their face, and that the Eleventh Circuit could have decided the federal claims without deference to the Alabama Supreme Court. App. at 114a. He further expressed the view that, under the jurisdiction-stripping statute *Ala. Code* § 17-15-6, the Montgomery state court lacked jurisdiction over the case. App. at 132a. He did not address the federal issues, but advised he should not be understood as agreeing with the opinion of the other four justices. App. at 135a.

The answer to the certified question was filed on or about March 14, 1995. Plaintiffs objected to the answer, and did so largely on the grounds discussed above.

5. The second Eleventh Circuit opinion affirmed and remanded for additional fact-finding after Alabama opinion was received.

After the answer was provided, the Eleventh Circuit accepted supplemental briefs from the parties and issued directions to the District Court as to factual inquiry to be undertaken. It directed as well that "a speedy trial" be provided, and rather than failing to give any explanations of any legal issue, as Petitioner contends, the court cited its prior legal discussions in *Roe v. State of Alabama,* 43 F.3d 514 (11th Cir. 1995), and reminded the litigants "to determine the practice in Alabama regarding the counting of contested absentee ballots prior to the November 8 election," and "what effect, if any, the contested absentee ballots had on the outcome of the elections for Chief Justice and Treasurer." App. at 8a.

In connection with issuance of the second opinion, the court did not attempt to address any of the criticisms by the Alabama Supreme Court. However, Judge Edmondson no longer appeared to be in dissent or insistent on dismissal of the case out of respect for state court processes.

The case is pending in the District Court. Discovery has ended, except possible examination of absentee ballots pursuant to a mandamus request in the Eleventh Circuit by Petitioner Davis. Trial is scheduled for September 19.

REASONS FOR DENYING THE WRIT

This case has given new meaning to the word "ballot box stuffing." It is a sophisticated meaning, which uses

judges to attempt to give it legitimacy. It is a case about a brazen attempt on the part of supporters of the incumbent Chief Justice of the Alabama Supreme Court and certain members of the state judiciary to change the voting rules after the election is over, thereby salvaging the re-election hopes of that Chief Justice. One federal district court judge has indicated that this attempt "personally repulsed" him.[4] The district court judge in the proceedings below described this attempt as "abominable" and "contemptible."[5]

Despite Petitioner's attempt to mischaracterize this case, the controversy here is not an "ordinary dispute over the counting and marking of ballots." It is not a case involving "garden-variety election irregularities." It is a controversy over whether the State of Alabama, through certain members of its judiciary, can deliberately and systematically adopt and retroactively apply a statewide change in its voting laws and practices after an election is over and its results before known. If the State is allowed to do this, there will be a "patent and fundamental unfairness" in the conduct of the elections for the offices of Chief Justice and Treasurer of the State of Alabama, clearly implicating the First Amendment and Fourteenth Amendment rights of the Plaintiffs and the voters they represent.

The preliminary relief was issued by the District Court and the Eleventh Circuit to prevent the misuse of absentee ballots, a misuse that could not be corrected without risks to the secrecy of the ballot. This was the proper balance of the equities, and a fair way to protect voting

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[4]*Bradford v. State of Alabama,* CV 94-PT-2816-M (N.D. Ala. 1994), Memorandum Opinion dated November 25, 1994 issued by Judge Robert B. Propst, at p.7. R1-27, Ex. 5.

[5]See Transcript of December 5, 1994 hearing in the District Court. R3-170-171.

rights for all citizens, as well as a sense of decency about democracy in Alabama.

1. Wise judicial economy counsels against review because of the interlocutory character of the decisions below.

The writ should be denied because the decisions below are not final. Trial on the merits is set for September 19. A full and complete record will be available in the event appellate review is sought after final judgment, and there are no unusual factors which justify a grant of certiorari at this juncture. Judicial resources will obviously be preserved for efficient use if any review here is delayed until after a final judgment is rendered.

2. There is no conflicting decision of any other court which justifies review of the preliminary injunction.

Petitioner's claim to the high ground of federalism is too amorphous to give the action of the lower courts any significance beyond the incredible, unique circumstances surrounding it. The likelihood that another state judge, and the justices of a state supreme court, would attempt such a post-election change of rules, is too remote to justify further review. It is most unlikely that anyone would repeat the errors in judgment reflected by three financial contributors to the campaign of the affected Chief Justice, in the issuance of the opinion claimed to be in conflict with the Eleventh Circuit. In other words, the disposition of this case in the courts below reflects a proper balance of the tension between the need to prevent patent, fundamental unfairness under First and Fourteenth Amendments as well as the Supremacy Clause *and* the need to restrain against involvement in state electoral affairs.

Fundamentally, the lower courts were acting to preserve democratic government against a systematic, deliberate statewide change of voting rules *after* the election was concluded. Surely, this preservative action is at the core of the due process clause and the equal protection clause of the Fourteenth Amendment, and is a proper effort to guarantee the rights and privileges of national citizenship. *See Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886) (voting "preservative of all rights"); *United States v. Saylor,* 322 U.S. 385, 389 (1944); *Reynolds v. Sims,* 377 U.S. 533, 554, 555-62 (1964); *Griffin v. Burns,* 570 F.2d 1965, 1075 (1st Cir. 1978); *Duncan v. Polythress,* 657 F.2d 691, 703 (5th Cir., Unit B 1981), *cert. dismissed,* 459 U.S. 1012 (1982) (attempt to change rules on filling judicial vacancies). Their intervention was limited and justified.

Such a view of the rights at stake in no sense conflicts with any other decisions cited by Petitioner at 13-14, 16-17; all are "garden variety" election disputes over the marking of ballots. None rises to a level of systematic or structural problems with a state election.[6]

Petitioner highlights *Pettengill v. Putnam County R-1 School District,* 472 F.2d 121 (8th Cir. 1973). Not only is Petitioner wrong in his comparison of *Pettengill* and the case at bar, in point of fact, the complete lack of meaningful similarity in the acts complained of in *Pettengill* and those complained of in the present case merely serves to highlight the true nature of what is involved in the present case. In *Pettengill,* there were 116 electors who

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[6]*Hutchinson v. Miller,* 797 F.2d 1279, 1283 (4th Cir. 1986), *cert. denied,* 479 U.S. 1088 (1987); *Curry v. Baker,* 802 F.2d 1302 (11th Cir.), *cert. dismissed,* 479 U.S. 1023 (1986); *Partido Nuevo Progresista v. Barreto Perez,* 639 F.2d 825 (1st Cir. 1980), *cert. denied,* 451 U.S. 985 (1981); *Pettengill v. Putnam County R-1 School Dist.,* 472 F.2d 121 (8th Cir. 1973); *Hubbard v. Ammerman,* 465 F.2d 1169 (5th Cir. 1972), *cert. denied,* 410 U.S. 910 (1973); *Powell v. Power,* 436 F.2d 84 (2d Cir. 1970).

cast absentee ballots which were void because of irregularities in the application, delivery or execution of these ballots. 472 F.2d at 122. The Eighth Circuit Court of Appeals repeatedly referred to these problems simply as election "irregularities." *Id.* at 121-122. It rejected the plaintiff's claims as a request for it to become an "arbitrator of disputes over whether particular persons were or were not entitled to vote or over alleged irregularities in the transmission and handling of absentee voter ballots." *Id.* at 122.

In complete contrast to *Pettengill*, the present case involves a deliberate, systematic, statewide change in election rules and practices — and an attempt on the part of state officials to implement such a change after the election was over. There is no way to describe the effect of the *Odom v. Bennett* decision as a mere irregularity.

Petitioner's effort to differentiate this case from other systematic changes of practice cases is also unavailing. None of the cases purports to authorize a systematic statewide post-election change of rules, which rules could have induced people not to seek to vote or altered campaign strategies. Distinguishing *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980), *cert. denied*, 451 U.S. 985 (1981), ("PNP"), the Eleventh Circuit noted that no one except the voters who mismarked their ballots in that case could have been disenfranchised unfairly by the post-election change, as no one is likely "to have acted to their detriment by relying upon the invalidity" of ballots with marks outside the ballots' drawn rectangles. App. at 28a. By contrast, here, the state court ordered a change of practice, which prior practice clearly was relied upon. App. at 28a (noting that supporters of Hooper and Martin may have declined to vote, or candidates declined to solicit votes, because of the inconvenience of obtaining witnesses or notarization). Therefore, the change of

rules has an unfair effect on potential voters and candidates in the 1994 election who relied on them.[7]

Plaintiffs therefore believe no conflict exists between the decision below and decisions in other circuits.

3. The gratuitous expressions on federal law by the Alabama Supreme Court justices are not of sufficient authority so as to amount to a conflict with the Eleventh Circuit's opinion which this Court needs to resolve.

Petitioner attempts to claim a conflict in lower court decisions arising from the expressions about federal law made in responding to the certified question under Rule 18 of the Alabama Rules of Appellate Procedure. *See* Petition at 14. These expressions are mere *dicta,* as nothing in that rule purports to authorize issuance of controlling decisions on federal law. Not surprisingly, in view of the abstention doctrines out of which the procedure emerges, the rule speaks only about state law. *Accord, Ala. Const.,* amend. 328, sec. 6.02 (conferring original jurisdiction "to answer questions of state law certified by a court of the United States").

Furthermore, the decision was so lacking in procedural regularity as to be unworthy of the label "judicial." It could qualify as a campaign memorandum, being pre-

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[7]It is also noteworthy that, like *Griffin, Brown v. O'Brien,* 469 F.2d 563, 569 (D.C. Cir.), *vacated as moot,* 409 U.S. 816 (1972), and *Briscoe v. Kusper,* 435 F.2d 1046 (7th Cir. 1970), the case at bar involves a post-election change which could have been pursued long before the election. The fact that it was not triggers the same concern as was expressed in *Griffin,* namely that "voters' grievances concerning an election [ought], when possible, to be aired prior to the election. '[C]itizens having grievances may not lay by to see how the election will turn out before complaining.'" 570 F.2d at 1075 (quoting *Toney v. White,* 488 F.2d 310, 315 (5th Cir. 1973)). In contrast, the grievance over the mismarked ballots in *PNP* could not have been aired before they were mismarked.

pared by three financial contributors to the re-election bid of the then Chief Justice. The decision may itself be violative of due process of law as the product of judges who have a direct pecuniary interest in the dispute. *See, e.g., Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 821-25 (1986) (holding that the participation of a justice with direct, pecuniary interest violated a party's due process rights).

A. The procedural history of this case recited in the Alabama opinion is seriously flawed.

The Alabama justices' opinion is grounded on such a misperception of the procedural history of this case, as shown by the record, that it could be deemed to refer to a factually different case from the one at bar.

The most egregious miscasting of this history is in the characterization of the Plaintiff parties in the litigation. On several occasions, parties filing suit, on behalf of interests distinct from the Republican Party, are characterized as "Republican." Plaintiff Larry Roe, suing on behalf of *all* qualified voters, R1-1-2, is described as "a voter who voted for these Republican candidates [Hooper and Martin]." App. at 45a. In truth, nothing in the record shows for whom Roe voted, and, as one would expect, no one even asked him during the December 5 hearing in the District Court. R3-132 to 135.

The opinion also goes to great lengths to show the involvement of overlapping counsel in several cases, and even this effort misdescribes the true history. For instance, on pages 12 and 13, the opinion asserts that attorneys Johnston and Druhan, who signed the original Complaint in the case at bar, "represented parties in the U.S. District Court for the Northern Division [sic]." Presumably this refers to the action where Bradford sued in the Northern District of Alabama. This is an incorrect

understanding, as Johnston and Druhan were not in the *Bradford* case. Furthermore, none of the briefs on the certified question even attempted to describe which counsel represented which party in the litigation preceding the December 5 action of the District Court for the Southern District of Alabama.

In addition, the opinion implies that the Complaint in this case was filed after the ruling in *Odom v. Bennett* on November 17. App. at 45a-46a. In fact, the Complaint was filed on November 16, *before* the *Odom* case began.

Accordingly, the expressions of opinion about federal law and federal jurisdiction are based on an incorrect understanding of the history of this, and related, litigation. These expressions provide no basis for changing course at this stage of this case.

B. The Alabama opinion misdescribes the record evidence in the Odom case.

The opinion also mischaracterizes the record in *Odom v. Bennett*. The opinion makes the erroneous claim that the record there is "undisputed." Indeed, the evidence presented by *Davis* in the *Odom* case on the night of November 17 *was* "undisputed," in favor of Plaintiffs' claim here. It was undisputed to the effect that the general, statewide practice has been to reject unnotarized, unwitnessed absentee ballots, just as the District Court found in its hearing.

For some reason, however, the four justices chose to make no mention, in their opinion, of this undisputed testimony. They chose not to mention the testimony of Vicki Balough, an election analyst for the Secretary of State for the last six years. Ms. Balough explained at the temporary restraining order hearing in the *Odom* case during the night of November 17, 1994, that, during the tenure of the most recent three Secretaries of State, the

State has given statewide instructions to local election officials "to not count [absentee ballot] votes where there was no notary or two witnesses." R3-162, DX1, (R-71, 73). Balough's testimony was provided to the District Court by attorneys for Davis when they introduced the record in the Montgomery action to the District Court. R3-162. The four justices also chose not to mention in their opinion the testimony of the other three witnesses who testified in *Odom v. Bennett* on November 17, all of which was consistent with Ms. Balough's testimony. R3-29-33, 38-39, 42-43, 46 (Circuit Clerk of Montgomery County); R3-49-55 (Bullock County poll watchers); R3-55, 57-59 (Chief Clerk, Montgomery County Probate Court).

Furthermore, in claiming that certain matters in the *Odom* case show a non-uniform practice in counting absentee ballots, the opinion neglects to mention that those facts conflict with the original *pleadings* of Davis in the Montgomery action. R3-162, DX1. Those pleadings assert a statewide practice of refusing to count unwitnessed absentee ballots and those pleadings purport to join election officials throughout the state using Montgomery County officials as representatives of a defendant class. *Id.* Moreover, Davis obtained an order using such pleading, making such assertions of statewide practice, but now seeks to repudiate his own prior position. In addition, the November 17 order of the court in the *Odom* case refers to a statewide practice of not counting unwitnessed absentee ballots. R3-162, DX1, at R-84 to 88. The portion of the *Odom* record upon which the four justices rely is limited to affidavits developed largely *after* the Eleventh Circuit's January 1995 decision.

Similarly, the statements of fact made in the opinions are not binding here, even under the Alabama Supreme Court's own decision. The Supreme Court of Alabama wrote about itself, three days *after* responding to the Eleventh Circuit: "[T]he certified question procedure does

not place this Court in a position of making factual findings . . . ." *Ericsson GE Mobile Communications, Inc. v. Motorola Communications and Electronics, Inc.*, No. 1931189, 1995 WL 111910 (Ala. March 17, 1995). Whatever may be said about the impact of the factual references in the Alabama justices' opinion, they may not even be writing about the same case as was before the Eleventh Circuit.

C. The Alabama opinion misunderstands basic procedural issues.

Incredibly, the Alabama opinion asserts that, because the three-judge panel in *Bradford v. State of Alabama*, CV-94-PT-2816-M, an action which was brought under Section 5 of the Voting Rights Act, refused to hear constitutional claims similar to those raised by the Plaintiffs in this case, *Bradford* is *res judicata* as to this Court's consideration of the Plaintiffs' claims. App. at 50a, 55a. Aside from the fact that the three-judge panel convened in *Bradford* had no jurisdiction over these constitutional claims once "preclearance" was given by Justice Department lawyers, the four-justice opinion also ignores the fact that the United States District Court for the Northern District of Alabama ultimately dismissed Mr. Bradford's constitutional claims *without prejudice.*

In commenting on the notice of the December 5 hearing in this case, the opinion also overlooks the absence of any objection by Davis to the December 5 hearing on Plaintiffs' due process claims. Indeed, the opinion suggests that the Defendants objected to consideration of the due process claims, App. at 52a-53a, & n.10, when actually Davis did *not* object and the other Defendants abandoned any objection they may have had at one time. The absence of any objection from Davis was not surprising, as he had been litigating over the counting of unwitnessed absentee ballots since November 16 in the

Odom case, and also in the case known as *Bradford v. State of Alabama,* since November 18.

The Eleventh Circuit's remand of the case for trial on the merits would certainly be sufficient to "get the facts straight," and show no conflict with its own decisions which might warrant this Court's review, at least not at this stage where the only orders are interlocutory.

4. The Rooker-Feldman *doctrine was no bar to jurisdiction of the District Court.*

The Eleventh Circuit was correct in finding that the obligation to appeal decisions of state courts to the U.S. Supreme Court, known as the *Rooker-Feldman* doctrine, is no bar to action by the District Court. For numerous reasons, the Petition reflects an incorrect view of application of the *Rooker-Feldman* doctrine, and related doctrines of abstention. Also, it has not been shown to be in conflict with any other circuit court decision, or is otherwise so important as to justify review.

The *Rooker-Feldman* doctrine directs federal courts not to sit in review of the final judgment of a state court. It is based on the statute providing for appeal of state court judgments to the U.S. Supreme Court. 28 U.S.C. § 1257. In the case at bar, there is no final judgment or decree implicated in the *Odom v. Bennett* state court order.

Second, the Eleventh Circuit correctly noted that the Plaintiffs here are not even parties to the *Odom* case, and they cannot be said to have had a reasonable opportunity to present their constitutional claims in that case. App. at 24a. This is even more true in light of the hurried nature of the temporary injunction hearing conducted by Judge Reese during the night of November 17, 1994. Indeed, the violation of Plaintiffs' constitutional rights, which gave rise to the District Court's preliminary injunction, did not even occur until the state court issued its Order.

Thus, the federal constitutional rights at issue in this case were not even part of the *Odom* case, and were not considered by that state court, so far as to create an obligation on the part of Messrs. Roe, Hooper and Martin, or the voters they represent, to intervene. *See Wood v. Orange County,* 715 F.2d 1543, 1546-47 (11th Cir. 1983); *Martin v. Wilks,* 490 U.S. 755 (1989); I*n Re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d 1492, 1498 (11th Cir. 1987) (no privity between association and its members where association appeared in prior proceeding).[8]

Petitioners point to appearance here of counsel for the Republican Party in the *Odom* case, but that hardly provides a reasonable basis for application of the doctrine. In the abstention doctrine, dubbed "closed-related" by Petitioner, at 15, common counsel is not enough. Neither are similar business activities and problems. Instead, they must be demonstrated "in terms of ownership, control, and management" for even these other abstention doctrines to apply. *Doran v. Salem, Inc.,* 422 U.S. 922, 928-29 (1973).

This should be all the more true for a political party. As rancorous as political associations are, as tentative as political coalitions and agreements are (even intra-party agreements), common membership seems too thin a reed on which to conclude that the Plaintiffs are the same as those in the *Odom* case. It would be particularly odd given that Plaintiffs are class representatives for all qualified voters, not just Republicans. Similarly, the interest of a candidate, with his own interests and needs, are

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[8]Plaintiffs filed this suit before the *Odom* case began, and even if the parties were the same, *Ala. Code* § 6-5-440 (1993) has long barred the state courts from proceeding in the face of a prior pending federal action. *See Terrell v. City of Bessemer,* 406 So. 2d 337 (Ala. 1981); *Johnson v. Brown-Service Insurance Co.,* 293 Ala. 549, 307 So. 2d 518 (1974).

obviously *not* the same as those of his political party.[9] In a nutshell, Petitioners have a strangely monolithic view of political party organization, and it should not be sufficient to justify preclusion of an action by these Plaintiffs.

To the extent that the *Rooker-Feldman* doctrine is designed to prevent undue interference by federal courts in state affairs, it is material that the State, itself, takes the position that there is no unnecessary intrusion in its affairs by virtue of the exercise of jurisdiction by the lower courts in this case.

Finally, and perhaps most saliently, the opinion of this Court in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 483 (1983), actually supports Plaintiffs' position in this issue. In *Feldman,* the plaintiff was challenging a pre-existing state action — in that case, a pre-existing rule which denied admission to District of Columbia bar applicants unless they had graduated from approved law schools, regardless of any special or extenuating circumstances. 460 U.S. at 465-70. If this rule was unconstitutional, it was unconstitutional at the time it was challenged in the District of Columbia Court of Appeals. In other words, a "case" had already arisen within the meaning of the Constitution because a "question respecting the Constitution, treaties or laws of the United States [had] assumed 'such a form that the judicial power [was]

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[9]In *Marks v. Stinson,* 19 F.3d 873, 885-86 n. 11 (3d Cir. 1994), *cert. denied sub nom, Dougherty v. Marks,* 115 S.Ct. 901 (1995), the Third Circuit refused to conclude that prior state proceedings barred actionable federal challenges for several reasons. First, the parties were different, in some respects. Second, the state proceedings did not reach the merits of the constitutional claims. The panel wrote: "[T]he district court could (and did) find that Marks' . . . fraud and constitutional claims had merit without also finding that the court of common pleas erred when it dismissed their proceedings." 19 F.3d at 886 n. 11. Similarly, this action should not be deemed an improper appeal of a final judgment of a state court.

capable of acting on it.'" *Id.* at 478 (quoting *In re Summers*, 325 U.S. 561 (1945)).

Feldman does not represent a case where the District of Columbia Court of Appeals "look[ed] to the future and chang[ed] existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Id.* at 479 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 216 (1908)). Nor did the court "engage in rulemaking." *Id.* (quoting *Summers*, 325 U.S. at 566). "Instead, the proceedings before the District of Columbia Court of Appeals involved a 'judicial inquiry' in which the court was called upon to investigate, declare, and enforce *'liabilities as they [stood] on present or past facts and under laws supposed already to exist.'" Id.* (quoting *Prentis*, 211 U.S. at 226) (emphasis added). In his District of Columbia court action, Feldman questioned the fairness of the pre-existing rule and made explicit legal arguments against it based on the Constitution and on federal antitrust laws. *Id.* at 479-80. As the *Feldman* Court emphasized, *"[a]ll of this was done against the background of an existing rule." Id.* at 480 (emphasis added).

In the case at bar, however, the gravamen of Plaintiffs' case is that the *Odom* case ordered a new rule, or at least a new practice, which was the equivalent of engaging in "rulemaking." While the *Feldman* Court was "called upon to investigate, declare, and enforce 'liabilities as they [stood] on present or past facts and under laws supposed already to exist," the state court was asked to change the existing rules pertaining to the counting of absentee ballots. Thus, it was not until the state court ruled as it did, entering a temporary restraining order requiring a change in practice and in state rules, that a "case" arose within the meaning of the Constitution and the laws of the United States. No cause of action against the State existed before that.

Petitioner cites no authority alleged to be in conflict with the Eleventh Circuit decision, except the Alabama Supreme Court's answer to the certified question. As shown above, there are numerous reasons why the Alabama opinion should not be deemed to be a conflict that needs resolution by this Court.

CONCLUSION

For these reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX I

RELEVANT U.S. CONSTITUTIONAL PROVISIONS

Article VI, Section 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1

[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES

28 U.S.C. § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by

any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1651

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

42 U.S.C. § 1974

§ 1974. Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation

Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

RELEVANT ALABAMA CONSTITUTIONAL PROVISIONS

Amend. No. 328

CONSTITUTION OF ALABAMA OF 1901

6.02. The supreme court.

(a) The supreme court shall be the highest court of the state and shall consist of one chief justice and such number of associate justices as may be prescribed by law.

(b) The supreme court shall have original jurisdiction (1) of cases and controversies as provided by this Constitution, (2) to issue such remedial writs or orders as may be necessary to give it general supervision and control of courts of inferior jurisdiction, and (3) to answer questions of state law certified by a court of the United States.

(c) The supreme court shall have such appellate jurisdiction as may be provided by law.

RELEVANT ALABAMA STATUTES

§ 12-2-14. Appointment of members of bar to sit as special judges in determination of certain cases.

When by reason of disqualification the number of judges competent to sit in a case is reduced to eight or to six and there is equal division among them on any question material to the determination of the case, the fact shall be certified by the chief justice or, when he is disqualified, by the judges sitting to the governor, who shall thereupon appoint a member of the bar of the supreme court to sit as a judge of said court in the determination of said case. Similarly, when by reason of disqualification no one of the judges is competent to sit in a case or the number is reduced below six, the fact shall be certified by the chief justice, if he is competent to sit, or, if not, by the judge or judges sitting, or, if no one is competent, by the clerk of the court to the governor, who shall thereupon appoint members of the bar of the supreme court to constitute a special court of seven members for the consideration and determination of such case.

The word "disqualification," as used in this section, shall include inability to sit by reason of prolonged illness of a chronic nature.

§ 17-10-7. Form of affidavit to be printed on envelope — General, special or municipal elections.

Each absentee ballot shall be accompanied by an envelope upon which shall be printed an affidavit. This affidavit which shall be used in general, special or municipal elections shall be substantially as follows:

"State of Alabama

"County of . . . . . .

"I, the undersigned, do swear (or affirm) that:

"(1) I am a resident of . . . . . county in the state of Alabama.

"(2) My place of residence in Alabama is:

. . . . . .

(street)

. . . . . ., Alabama . . . . . .

(city or town) (zip code)

"(3) My voting precinct (or place where I vote) is:

. . . . . .

"(4) My date of birth is: . . . . . .

month day year

"(5) I am entitled to vote an absentee ballot because:

"Check only one:

_____ I have moved from Alabama less than thirty days prior to the election.

_____ I will be out of the county or the state on election day.

_____ I am physically incapacitated and will not be able to vote in person on election day.

"I further swear (or affirm) that I have not voted nor will I vote in person in the election to which this ballot pertains.

"I have marked the enclosed absentee ballot voluntarily and that I have read or had read to me and understand the instructions accompanying this ballot and that I have carefully complied with such instructions.

"Moreover, I further swear (or affirm) that all of the information given above is true and correct to the best of my knowledge and that I understand that by knowingly giving false information so as to vote illegally by absentee ballot that I shall be guilty of a misdemeanor which is punishable by a fine not to exceed $1,000.00 and/or confinement in the county jail for not more than six months.

. . . . . .

(Signature or mark of voter.)

"Note: Your signature must be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older.

"Sworn to and subscribed before me this . . . . . day of . . . . . , 19. . . I certify that the affiant is known (or made known) to me to be the identical party he claims to be.

. . . . . (Signature of official)

(Title of official)

. . . . . .

(Address of official)

OR

"1st Witness . . . . . .

Signature

. . . . . .

Print name

. . . . . .

Address

. . . . . .

City Zip Code

"2nd Witness . . . . . .

Signature

. . . . . .

Print name

. . . . . .

Address

. . . . . .

City Zip Code

§ 17-10-9. Two envelopes to be furnished with ballot; form thereof; delivery of ballot to absentee election manager.

Each prospective absentee voter who meets the requirements of this chapter shall be furnished with the absentee ballot herein provided for, together with two envelopes for returning his marked ballot. One envelope shall be a plain envelope in which the ballot shall be sealed by the voter after he has marked it.

The second envelope shall have the voter's affidavit printed on the back and shall be large enough to seal the plain ballot envelope inside. The second envelope shall also be a return mail envelope.

Such return mail envelope shall be addressed on the front to the absentee election manager and shall be endorsed on the left-hand upper corner thereof substantially as follows:

"Absent Voter's Ballot. State, County, Municipal, General, Primary or Special Election (as the case may be) to be held on the . . . . . day of . . . . . ., 19. . . From . . . . . (name of voter), precinct or districts . . . . ., County of . . . . ., Alabama."

After marking the ballot and subscribing the oath herein required, the voter shall seal his ballot in the plain envelope, place that plain envelope inside the affidavit envelope, complete the affidavit, and shall forward it by United States mail to the addressee or shall hand it to him in person.

§ 17-10-10. Procedure upon receipt of ballot by absentee election manager; counting of ballots.

Upon receipt of the absentee ballot, the absentee election manager shall record its receipt thereof on the absentee list as provided in section 17-10-5 and shall safely keep the ballot without breaking the seal of the affidavit envelope. On the day of the election, beginning at 12:00

Noon, the absentee election manager shall deliver the sealed affidavit envelopes containing absentee ballots to the election officials provided for in section 17-10-11, and such election officials shall call the name of each voter casting an absentee ballot with poll watchers present as may be provided under the laws of Alabama and shall open each affidavit envelope, review the affidavit to certify that such voter is entitled to vote and deposit the plain envelope containing the absentee ballot into a sealed ballot box. The absentee ballots shall upon the closing of the polls be counted and otherwise handled in all respects as if the said absentee voter were present and voting in person. As regards municipalities with populations of less than 10,000, in the case of municipal elections held at a time different from a primary or general election, such return mail envelopes containing the ballots shall be delivered to the election official of the precinct of the respective voters.

§ 17-14-20. Canvass of election returns by state officials.

All returns of elections required by law to be sent to the secretary of state must, within 15 days after an election, be opened and counted in the presence of the governor, secretary of state and attorney general, or two of them.

§ 17-15-6. Jurisdiction denied judges or courts exercising chancery powers in election contests; appeal.

No jurisdiction exists in or shall be exercised by any judge, court or officer exercising chancery powers to entertain any proceeding for ascertaining the legality, conduct or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute; and any injunction, process or order from any judge, court or officer in the exercise of

chancery powers, whereby the results of any election are sought to be inquired into, questioned or affected, or whereby any certificate of election is sought to be inquired into or questioned, save as may be specially and specifically enumerated and set down by statute, shall be null and void and shall not be enforced by nay officer or obeyed by any person; and should any judge or other officer hereafter undertake to fine or in any wise deal with any person for disobeying any such prohibited injunction, process or order, such attempt shall be null and void, and an appeal shall lie forthwith therefrom to the supreme court then sitting, or next to sit, without bond, and such proceedings shall be suspended by force of such appeal; and the notice to be given of such appeal shall be 14 days.

§ 17-15-50. Statement — Filing; bond.

When any elector shall choose to contest any election for the office of governor, secretary of state, auditor, treasurer, attorney general, commissioner of agriculture and industries, justices of the supreme court or judges of the courts of appeals, he must, within 10 days after the speaker of the house of representatives shall have opened the returns and proclaimed the results of the election for governor, secretary of state, auditor, treasurer and attorney general, as provided in this chapter, file with the speaker of the house of representatives a written statement of the grounds of such contest and a bond with good and sufficient sureties payable to the state of Alabama and conditioned for the payment of such costs as may accrue upon such contest in the event such contest shall result in favor of the contestee. Such bond must be in the sum of $5,000.00 and must be subject to the approval of the speaker of the house, and such bond, when it shall be approved, shall be filed and recorded in the office of the secretary of state.

RELEVANT ALABAMA RULES OF COURT
ALABAMA RULES OF APPELLATE PROCEDURE

Rule 18.
Certified questions from federal courts.

(a) *When certified.* When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this state which are determinative of said cause and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court may certify such questions or propositions of law of this state to the supreme court of Alabama for instructions concerning such questions or propositions of state law, which certified questions the supreme court of this state, by written opinion, may answer.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

RALPH E. BRADFORD, SR., individually as an African-American citizen of the State of Alabama, and on behalf of all other African-American citizens of the State of Alabama similarly situated;	)	
PLAINTIFF,	)	CV 94-PT-2816-M
v.	)	
THE STATE OF ALABAMA; JAMES BENNETT, in his official capacity as Secretary of State for the State of Alabama; BOBBY JUNKINS, in his official capacity as Probate Judge of Etowah County, Alabama; JAMES HAYES, in his official capacity as Sheriff of Etowah County; BILLY S. YATES, in his official capacity as Circuit Clerk of Etowah County, Alabama,	)	
DEFENDANTS,	)	
MICHAEL LEWIS ODOM and JOHN W. DAVIS,	)	
INTERVENORS-DEFENDANTS.	)	

MEMORANDUM OPINION

As the judge to whom this case was initially assigned, and as the sole judge who issued the temporary restraining order, as amended, which was issued on November 18, 1994, this judge further addresses his reasons for voting to dissolve the temporary restraining order and to deny the application for preliminary injunction. This judge makes no suggestion that his opinion is or is not that of the other two judges assigned to the three judge panel by the Chief Judge of the Eleventh Circuit Court of Appeals.[1]

There may be some misunderstanding as to the role of this court. The sole issue before this court on November 18, 1994 was framed by the plaintiff(s)' complaint wherein it was alleged that,

> The order of the Circuit Court of Montgomery County, Alabama hereinabove described brought about and will bring about changes to the voting standards, practices, or procedures in place on the effective date of the Voting Rights Act of 1965 affecting the election of candidates for office in Alabama which were required to be precleared under Section 5 of the Voting Rights Act of 1965.
>
> The execution and implementation [of] said orders without first obtaining the approval of the United States Attorney General violate Section 5

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[1]As this judge made plain at the hearing on November 22, the decision of this court to dissolve its own restraining order had no effect on, nor did it conflict with, the ruling of any other court, state or federal. The three-judge panel in this case sat as a trial court, not an appellate court. To this judge's knowledge the action in this case was the only pending case which addressed § 5 of the Voting Rights Act. That was the only federal law addressed by this court. The attorneys, of course, were well aware of the foregoing. Their clients should have had no misunderstanding.

of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

On November 18, 1994, this judge preliminarily concluded that the order of the Circuit Court of Montgomery County, Alabama clearly brought about and will bring about changes to voting standards, practices or procedures. With regard to absentee ballot affidavits, § 17-10-7, provides "Your signature *must* be witnessed be either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older." (emphasis added).[2] This court respectfully disagrees with a conclusion that an "affidavit" which does not include either of the prescribed attestations "substantially complies" with the statute. Further, this judge does not agree that *Williams v. Lide*, 628 So. 2d 531 (Ala. 1993) so holds. Further, there was no evidence that *Williams v. Lide* itself had been precleared prior to November 8, 1994.

This judge, having determined that the Montgomery County Circuit Court order constituted, in midstream, a change in voting procedures, had only one other issue to address on November 18, 1994. That issue was whether, at the time of the filing of this action, approval of the change had been obtained from the United States Attorney General. It is undisputed that, at that time, it had not been. Based on these two findings and conclusions, this judge issued the final temporary restraining order, as amended, after notice and hearing. The court set November 22, 1994 as a date for the three judge panel to consider the application for preliminary injunction. See 28 U.S.C. § 2284(b)(3).

Early in the morning of November 22, 1994, the Office of the Attorney General of the United States issued a letter which purportedly stated that the Attorney General interposed no objection to the change created by the

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[2]It is not clear who represented the voters of Alabama in said case. Of course, the same question might be asked concerning this case.

order of the Circuit Court of Montgomery County, Alabama. The letter did not specifically mention the order of said state circuit court. Neither did the letter refer to any basis for a determination that the change is free of discriminatory purpose and effect or that such a decision had been specifically made.[3] Apparently, this "determination" was made quickly and in a conclusory fashion, based upon "evidence" from sources of which this court is unaware. This court can quickly think of several possible reasons for concluding that the change is not free of discriminatory purpose and effect. First, the change was made in midstream after a preliminary count had been completed and reported to the Secretary of State of Alabama. Such a "wait and see" approach could clearly suggest discriminatory purpose and effect. Second, the new rule, having been announced *after* the election, was patently discriminatory as to those potential voters who may have felt that they would have to comply with the seemingly stringent requirements of § 17-10-7 in order to vote an absentee ballot.

It is undisputed that the current instructions of the Secretary of State and an earlier opinion of the Attorney General of Alabama had clearly required compliance with the notary or witness provision of § 17-10-7.[4] The

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[3]28 CFR Ch 1 (7-1-94 Edition) Subpart F, which prescribes the standards applicable to "Determinations by the Attorney General" includes the following at § 51.52(c).

> (c) *Objection.* An objection shall be interposed to a submitted change if the Attorney General is unable to determine that the change is free of discriminatory purpose and effect. This includes those situations where the evidence as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that the change is free of discriminatory purpose and effect.

[4]*See* Henderson v. Graddick, 641 F. Supp. 1192 (M.D. Ala. 1986) for a discussion of the effect of action of the Attorney General of the State of Alabama with regard to election procedures.

foregoing, coupled with the common knowledge that absentee ballots have been historically an area fraught with the potential for fraudulent abuse, suggests the potential for discrimination. The cases which this judge has read suggest that the purpose of the subject statutory provisions is to protect the integrity of the ballot. It is obvious that the lack of such a requirement lends itself to misleading, intimidation, or even forgery.[5] The legislative desire to protect the integrity of such ballots is commendable.

Notwithstanding the foregoing, this court is bound by the "determination" of the United States Justice Department which some, perhaps, would commend for its prompt action.[6] In *Morris v. Gressette*, 432 U.S. 491, 507 (1977), the United Supreme Court stated,

> Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation. But it cannot be questioned in a suit seeking judicial review of the Attorney General's exercise of discrimination under §5, or [her] failure to object within the statutory period.

Further,

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[5] Plaintiff(s)' First Amended Complaint has an attached statement from a voter who says that she was not allowed to vote personally in the November 8, 1994 election because she "had already voted absentee." The declarant states that she had not voted absentee. There are other declarations concerning voting by dead people, non-residents, etc.

[6] The response of the Office of the Attorney General to the court's request for clarification removed doubt as to the intent of that Office. Curiously, the initial letter suggests that possible previous non-precleared violations, on a county by county basis, of the apparently precleared Alabama statute created a situation whereby present adherence to the statute would have to be precleared.

> For the reasons stated in the text, we think Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act.

Id. 432 U.S. at 507, n. 24.[7]

The § 5 determination of the Attorney General having been received, this judge had no choice other than to vote to dissolve the temporary restraining order. Regardless of whether this judge may be personally repulsed by the circumstances pertinent to this case, this judge's respect for the law as an institution prohibits his abusing his authority even in an attempt to remedy other per-

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[7]In dissent, Justice Marshall (Justice Brennan concurring) stated,

> Under the Court's ruling, it matters not whether the Attorney General fails to object because he misunderstands his legal duty, as in this case; because he loses the submission; or because he seeks to subvert the Voting Rights Act. Indeed, the Court today grants unreviewable discretion to a future Attorney General to bargain acquiescence in a discriminatory change in a covered State's voting laws in return for the State's electoral votes. Cf. J. Randall & D Donald, The Civil War and Reconstruction 678-701 (2d ed. 1961) (settlement of the election of 1876).
>
> Common sense proclaims the error of this result. It is simply implausible that Congress, which devoted unusual attention to this Act in recognition of its stringency and importance, see *South Carolina v. Katzenbach,* 383 U.S. 301-09 . . . (1966), intended to allow the Act's primary enforcement mechanism to be vitiated at the whim of an Attorney General. Legal analysis supports the conclusion that Congress did no such thing. But today, the majority puts aside both common sense and legal analysis, relying instead on fiat. I dissent.

(footnote omitted). *Id.*, 432 U.S. at 507.
Justice Hugo Black's dissent in *South Carolina v. Katzenbach,* 383 U.S. 301, 355-362 (1966) also questioned the delegation of such authority to the Attorney General of the United States under § 5.

ceived abuses.[8] A Justice of the Supreme Court of the United States recently expressed his concern about the deterioration of the law as an institution. This judge will not contribute to any such decline.

This 25th day of November, 1994.

/s/ Robert B. Propst

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

[8] This court has neither officially approved nor officially disapproved the determination of the Attorney General of the United States nor the order or ruling of any other court, state or federal.

Supreme Court, U.S.
FILED
SEP 11 1995
OFFICE OF THE CLERK

NO. 95-64

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JOHN DAVIS, on behalf of himself and all others similarly situated,

Petitioners,

v.

STATE OF ALABAMA, PERRY O. HOOPER, SR., LARRY ROE, JAMES D. MARTIN, AND ALL ALABAMA PROBATE JUDGES, SHERIFFS, AND COUNTY CLERKS IN THEIR OFFICIAL CAPACITIES, et al.,

Respondents.

RESPONSE TO SUGGESTION OF DEATH AND MOTION TO SUBSTITUTE CLASS REPRESENTATIVE

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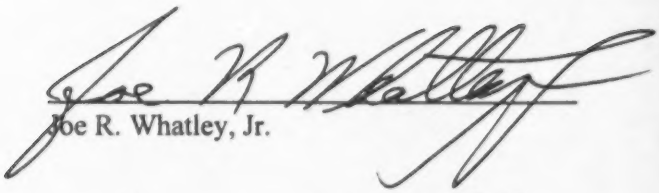
RESPONSE TO SUGGESTION OF DEATH
AND MOTION TO SUBSTITUTE CLASS REPRESENTATIVE

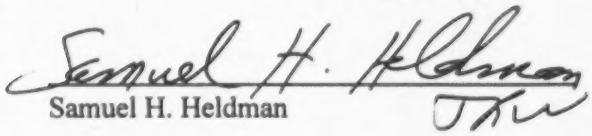
The class of voters disenfranchised by the lower courts' orders submits this response to the Suggestion of Death of the class's representative. The petition for writ of certiorari was filed on behalf of John Davis, the named representative of a then-putative defendant class, on behalf of himself and the class as a representative of whom he was sued. Although the class had not been formally certified prior to the filing of this Petition for Certiorari, this case had even prior to that time been treated as a defendant class action by the lower courts. See, e.g., Roe v. Alabama, 52 F.3d 300, 303 (11th Cir. 1995) (referring to "Davis class").

A suggestion of death has been filed with respect to Davis. Pursuant to Rule 35, Clarence T. Hellums moves to substitute as the named class representative for the petitioner class previously represented by John Davis. The class consists of registered absentee voters in Alabama, whose votes are being challenged in the courts below. Hellums is, and at all times has been, a member of the petitioning class. In the November 1994 general election, he was a fully registered and qualified voter. He attempted to cast an absentee ballot. Through inadvertence, his secretary failed to notarize the absentee ballot affidavit, and as a result of a preliminary injunction issued by the district court, and affirmed as modified by the Court of Appeals, his vote has not been counted, even though the Supreme Court of Alabama has ruled that his ballot and affidavit (and those like his) satisfy the state absentee ballot law. As shown by the attached order, the district court has granted Hellums' motion to substitute for Davis and has now formally certified the class that is petitioning this Court. Under these circumstances, this Court should likewise substitute Hellums for Davis and consider the petition for writ of certiorari on its merits.

Respectfully submitted,



Joe R. Whatley, Jr.



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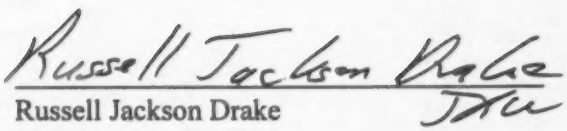

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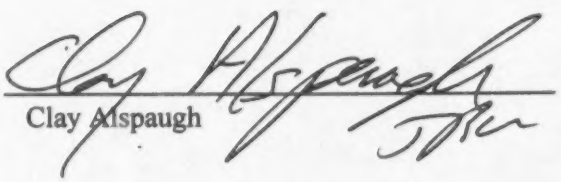

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U.S. DIST. COURT
AUG 23 8 37 AM '95
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY ROE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CIVIL ACTION NO. 94-0885-AH-S**
	)	
STATE OF ALABAMA, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on the "Motion Regarding Substitution of Defendant Class Representative" [Doc. #230] and Supplement to said Motion [Doc. #237] and the "Motion to Substitute Clarence T. Hellums, Jr. as a Class Representative for the Previously Designated Davis Class and to Certify Class" [Doc. #240] filed by the counsel for the previously designated Davis Class (hereinafter "Davis Class Defendant"), Plaintiffs' Withdrawal of Motion for Certification of Defendant Class [Doc. #232], the "Motion to Strike Answer of Defendant John Davis and All Subsequent Pleadings, Motions, Responses, Briefs, Objections, Notices, Disclosures, Etc." [Doc. #233] filed by Plaintiffs, and the Motion to Dismiss Cross Claim [Doc. #235] filed by Defendant State of Alabama. The Court ordered all parties to submit briefs addressing the issues raised by the death of Defendant Davis as representative of a putative class and Defendant's Motion to Substitute. The Court has considered the Briefs submitted by the Davis Class, the State of Alabama, and the Plaintiffs. After such consideration, the Court **GRANTS** the Motion to Substitute Clarence T. Hellums, Jr. and **CERTIFIES** the Defendant Class of approximately 1700 voters whose absentee ballot votes were not counted because the affidavit accompanying the ballot

did not contain notarization or the signatures of two witnesses. Mr. Hellums is the named representative of the Defendant class. The Court **DIRECTS** the Clerk of Court to substitute the name Clarence T. Hellums, Jr. for John Davis in the style of this action. Defendant's earlier Motion to Substitute [Doc. #230] is **MOOT**. The Court **DENIES** Plaintiffs' Motion to Strike [Doc. #233] and Defendant State of Alabama's Motion to Dismiss [Doc. #235].

I. BACKGROUND

Plaintiffs named John Davis as a Defendant on November 28, 1994, because he had obtained a court order from the Circuit Court of Montgomery County in the case of *Odom v. Bennett*, NO. 94-2434-R (Montgomery County Cir.Ct., filed Nov. 16, 1994). On August 4, 1995, Plaintiffs moved for Class Certification of Defendant Davis Class on behalf of persons who cast unnotarized or unwitnessed absentee ballots. However, prior to August 4, 1995, Defendant Davis Class has been treated as a class by this Court and by the United States Court of Appeals for the Eleventh Circuit. Defendant Davis has filed Cross-Claims against the State of Alabama alleging violation of the due process clause and the equal protection clause of the United States Constitution and the Voting Rights Act because of the refusal to count the unwitnessed, unnotarized ballots.

Plaintiffs and the State of Alabama both filed suggestion of death of Defendant John Davis on August 17, 1995. [Docs. #27 and 28]. The Alabama Certificate of Death for John W. Davis shows that Mr. Davis died on December 20, 1994. However, apparently counsel for Defendant Davis Class did not learn of his death until approximately August 15, 1995, as the first reference of his death came in a footnote in a Mandamus response filed in the Eleventh Circuit. Upon learning of Davis's death Plaintiff filed a Notice of Withdrawal of their Motion for Class

Certification of such Defendant class. [Doc. #232].

II. RULING

Neither the Court, nor any party has been able to find authority for the scenario presented by this action. Therefore, the Court finds itself in the awkward position of having to make a ruling without guide from precedence. However, the Court believes and so holds that the only way to reach a just result in this action is with the inclusion of the Davis Class. The Davis Class presents the only opposition to the claims of the Plaintiffs. The Court holds that the most reasonable way to answer the question posed by the Eleventh Circuit in *Roe v. Mobile County Appointing Board v. State of Alabama by and through Evans*, 52 F.3d 300 (11th Cir. 1995) is to include the Davis Class as Defendant/Cross-Claimant in this action.

Plaintiffs argue that the Davis Class should be dismissed from this action and that any relief, if meritorious, could be achieved in a post-judgment action.[1] The State of Alabama agrees with the Court that the Davis Class is necessary to the just resolution of this action, but argues that Davis should not be allowed to substitute a class representative for a defendant class and instead should be required to filed a motion to intervene as a plaintiff class pursuant to Fed. R. Civ. P. 24. The Court **GRANTS** the Motion to Substitute Mr. Hellums as the representative of the former Davis Class. The Court makes such a ruling for the following reasons:

1. Although, Plaintiffs and Defendant State of Alabama, may be correct in asserting that

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[1]Plainitiffs argue in their Memorandum that the Motion to Substitute should be denied. Plaintiffs state that they are willing to depose Mr. Hellums and if Plaintiffs believe he is a proper representative Plaintiffs will name him as a defendant. However, this litigation has already been delayed long enough. The case is set for trial on its merits on September 19, 1995 and the Court is of the opinion that its decision with respect to the substitution of Mr. Hellums should not be further delayed.

only a Plaintiff may move to substitute a representative of a *defendant* class, the Court finds that this action can be distinguished from the usual class action litigation. First, Plaintiffs amended their Complaint to add the Davis Class and from that point onward this Court and the Eleventh Circuit has treated Davis as a class. This Court granted a preliminary injunction that the State of Alabama and Davis appealed. The Eleventh Circuit certified a question to the Supreme Court of Alabama and then remanded the action to this Court. Therefore, the issues of class certification did not arise until almost six months after Plaintiffs' filed their original complaint when Plaintiffs moved for certification of the Davis Class. Plaintiffs withdrew the Motion upon learning of the death of Mr. Davis. Plaintiffs stated in their withdrawal that "the announcement of the death of Davis precludes the existence of any interests which can stop the entry of judgment, or otherwise oppose the relief sought by the plaintiffs." *See* Doc. #232.

Davis was not just a Defendant, he was also a cross-claimant. The Court holds that as a cross-claimant, the former Davis Class should be allowed to move for substitution. The interests of the Davis Class outlive Mr. Davis. The Court takes judicial notice of the fact that a voter who goes to the trouble of casting an absentee ballot would like to have that ballot counted even if it lacks notarization or the signature of two witnesses.

2. This Court finds that the Defendant Class meets the four prerequisites for a class action: (1) the class contains approximately 1700 voters therefore joinder is impracticable; (2) there are questions of law and fact common to the class; (3) the claims and defenses of Mr. Hellums are typical of the claims and defenses of such 1700 other voters; and (4) Mr. Hellums will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Plaintiffs and the State of Alabama both raised concerns about the Davis class counsel at the hearing on the above-listed

Motions on August 21, 1995. Both parties argued that the fact that Davis's counsel did not become aware of Davis's death until approximately eight (8) months after the event raises questions as to said counsel's ability to adequately protect the interests of the class. However, the Davis Class counsel has shown that it will doggedly litigate for the rights of the voters whose ballots are in question. Therefore, the Court finds that Davis Class counsel will adequately protect the interests of the class.

The Court **GRANTS** the Motion to Substitute and the Motion to Certify Class filed by Defendant Davis Class, now Hellums Class. The Court **DENIES** Plaintiffs' Motion to Strike and Defendant State of Alabama's Motion to Dismiss.

DONE this 28th day of August, 1995.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing on all counsel of record by U.S. mail, postage prepaid on this the 11 day of September, 1995.

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